Painters and Allied Trades District Council No. 51 of the International Brotherhood of Painters and Allied Trades, AFL–CIO *and* Manganaro Corporation, Maryland.[1] Cases 5–CC–1036 and 5–CB–4687

May 10, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On January 28, 1992, Administrative Law Judge Marvin Roth issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions, a brief in support of cross-exceptions, and an answering brief to the General Counsel's exceptions. An amici curiae brief was filed by the American Federation of Labor and Congress of Industrial Organizations, and the Building and Construction Trades Department, AFL–CIO.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[3]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings, and conclusions.[4]

[1] The caption has been amended to reflect the deletion of Cases 5–CC–1038 and 5–CB–4689 in which A.C. and S., Inc. (AC&S) was the Charging Party. There were originally four Charging Parties in this case. By the close of the hearing on June 12, 1986, there were only two: Manganaro Corporation, Maryland, and AC&S. The other two Charging Parties, Maryland Drywall and John H. Hampshire, Inc. reached settlements with the Union and withdrew their charges. Following the Board's Decision and Order on May 9, 1991, AC&S petitioned for permission to withdraw its charges. The judge granted the petition in a ruling and Order dated August 15, 1991. Manganaro Corporation, Maryland, which is the sole remaining Charging Party, indicated that it did not wish to participate in the remanded proceeding, but neither did it wish to withdraw its charges at that time.

[2] We grant the motion for leave to file a brief as amici curiae filed by the American Federation of Labor and Congress of Industrial Organizations and the Building and Construction Trades Department, AFL–CIO. The General Counsel's request that the Board strike that part of the amici brief dealing with the applicability of the construction industry proviso is granted, as the parties had stipulated that they would brief only the work-preservation issue. Further, the amici's argument is fully presented in their earlier amici curiae brief, which we accepted in our original decision in this case, 299 NLRB 618, 618 fn. 2 (1990).

The amici and the Respondent have requested oral argument, and the General Counsel opposes their requests. These requests are denied, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] Member Fox is recused from participating in this case.

[4] The Respondent, the Charging Party, and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

I. INTRODUCTION

This case arises in part from unfair labor practice charges filed by Manganaro Corporation, Maryland (Manganaro), on June 1 and 6, 1984. The consolidated complaint issued on November 15, 1985, alleges that Painters and Allied Trades District Council No. 51 of the International Brotherhood of Painters and Allied Trades, AFL–CIO (Union or Respondent) violated Section 8(b)(3) of the Act by refusing to refer employee-members to the jobsites of Manganaro and by demanding, as a condition of entering into an agreement with Manganaro, that Manganaro agree to an anti-dual-shop clause[5] that is in violation of Section 8(e) because it requires Manganaro to cease doing business with certain other employers unless the agreement was applied to Sweeney Company of Maryland (Sweeney) (Manganaro's dual-shop).[6]

The consolidated complaint also alleges a violation of Section 8(b)(4)(i) and (ii)(A) by the Union's refusal to refer employee-members to Manganaro's jobsites because an object of this action was to compel Manganaro to enter into an agreement containing the assertedly unlawful anti-dual-shop clause, in violation of Section 8(e). According to the complaint, the clause would require Manganaro to (1) cease doing business with any separate person unless the agreement was applied to that person; and (2) cease doing business with Manganaro Brothers, Manganaro Industries, and Manganaro Holding, so that these companies would cease doing business with Sweeney unless the agreement sought by the Respondent was applied to Sweeney.

The consolidated complaint further alleges that the Union violated Section 8(b)(4)(i) and (ii)(B) by its refusal to refer employee-members to the jobsites of Manganaro because an object of this action was to force Sweeney to recognize or bargain with the Union as the representative of Sweeney's employees and to force Manganaro to cease doing business with

[5] An anti-dual-shop clause is a clause that seeks to protect the employees in a bargaining unit from the effects of ''double-breasting,'' a phenomenon that is common in the construction industry. ''Double-breasting'' generally refers to a union employer's acquisition, formation, or maintenance of a separate nonunion company to perform the same type of work in the same geographic area as covered by its union agreement. See *Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023 (1993).

[6] At the time the events at issue took place, Manganaro and Sweeney were wholly owned subsidiaries of Manganaro Holding Company, which was a wholly owned subsidiary of Manganaro Brothers, Inc., which was a wholly owned subsidiary of Manganaro Industries. In his supplemental decision, the judge notes the parties' stipulation that prior to June 1, 1987, Sweeney and Sweeney Corporation Maryland (Corporation) were wholly owned subsidiaries of Manganaro Holding. Effective June 1, 1987, Corporation bought Sweeney, and Holding sold Corporation in its entirety to another entity. Holding has no further ownership interest in Sweeney.

Manganaro Brothers, Manganaro Industries, and Manganaro Holding, so that these companies would cease doing business with Sweeney unless the agreement sought by the Union was applied to Sweeney.

The judge issued his initial decision in this case on December 18, 1986. The judge found that the clause falls within the construction industry proviso to Section 8(e) and that the Union had not violated the Act by seeking the clause. He did not address in that decision whether the clause has a secondary objective and thereby falls within the general proscription of Section 8(e), or whether the Union's proposed clause constitutes a primary work-preservation clause and therefore does not violate Section 8(e).

The judge did find that the General Counsel had established a prima facie case of an 8(b)(4)(i) and (ii)(A) violation, in that the anti-dual-shop clause deals with the relationship between the signatory employer and other ''employers'' or ''persons'' within the meaning of the Act, and ''at least theoretically'' constitutes an agreement to ''cease doing business'' with other employers or persons within the meaning of Section 8(e). He recommended dismissal of the 8(b)(4)(A) and (3) allegations, however, because of his findings that the clause at issue is protected by the construction industry proviso to Section 8(e).

He also recommended dismissal of the 8(b)(4)(B) allegations because he found that the Union's sole purpose in refusing to refer employee-members to Manganaro's jobsites was to force Manganaro to sign an agreement containing the clause at issue, and not to organize the employees of Sweeney. Alternatively, he recommended dismissing this allegation because he found that Sweeney and Manganaro were a single employer.

On August 29, 1990, the Board remanded the case to the judge for the purpose of determining whether the proposed anti-dual-shop clause has as its objective a primary or secondary purpose.[7] In his supplemental decision, the judge found that the clause is a primary work-preservation clause and recommended that the complaint be dismissed in its entirety.

The Union and the General Counsel are the only parties participating in the remand proceeding before the judge.[8] They stipulated that, for the purposes of the remand, the bargaining unit for consideration of the work-preservation objective is comprised of Manganaro's employees (but without waiving the Union's argument that Manganaro and Sweeney were alter egos and/or a single employer with a shared bargaining unit), and that the parties would brief to the judge whether the Union's effort in 1983 and 1984 to obtain the work-preservation clause from Manganaro was a lawful effort to preserve bargaining unit work.

II. FACTUAL BACKGROUND

A. *The Companies*

At all relevant times, as previously stated, Sweeney and Manganaro were both wholly owned subsidiaries of Manganaro Holding Company (Holding), which was a wholly owned subsidiary of Manganaro Brothers, Inc. (Brothers), which in turn was a wholly owned subsidiary of Manganaro Industries (Industries). These five companies, together with another company, Manganaro New England, were commonly owned by brothers John and Frank Manganaro and were collectively referred to as the ''Manganaro Organization.'' John and Frank each owned one-half of the stock of Industries, and they, together with their brother Anthony, sit on the board of directors of all the companies.[9] As of May 1984, Frank was the sole director of Sweeney; John and Frank were directors of Industries, Brothers, Holding, and Manganaro; and Anthony had relinquished, or was in the process of relinquishing, his directorships with the various Manganaro companies. John was the board chairman of Manganaro, Sweeney, and Industries and was president of Industries, Brothers, and Holding.

The Manganaro brothers commenced business in 1959, beginning in Massachusetts, under the corporate name of Brothers. Since April 1982, Industries has been the parent corporation. Industries, Brothers, and Holding, together with Manganaro New England, have at all times been based at corporate headquarters in Malden, Massachusetts. Until the late 1970's the Manganaro Organization operated only in New England. However, as the Manganaro Organization continued to grow, the Manganaro brothers sought to expand into other areas of the country, specifically the Baltimore-Washington area and the Atlanta area. They subsequently abandoned the Atlanta operation, but remained in the Baltimore-Washington area.

Sweeney and Manganaro were incorporated in the Washington, D.C. metropolitan area in 1977 to engage in the business of installing drywall in the building and

[7] 299 NLRB at 619. In this decision, the Board vacated its earlier Orders and remanded the case to the judge to allow him to take additional evidence and to determine whether the clause at issue is valid as a primary work-preservation clause. In order to define further the issues on remand, the Board then considered the judge's finding that Manganaro and AC&S are part of the multiemployer unit of painting and drywall contractors in the Washington, D.C. area. The Board determined that neither Manganaro nor AC&S is a part of the multiemployer unit. The Board stated that it was making no finding whether the Association members were engaged in multiemployer bargaining, or whether they were bargaining as individual employers. The Board further stated that it reserved ruling on all other issues not resolved in the remand Order. 299 NLRB at 621 fns. 11 & 12.

[8] As noted above in fn. 1, Manganaro, the sole remaining Charging Party, indicated that it did not wish to participate in the remand proceedings.

[9] Until February 28, 1984, Anthony was also a co-owner of Industries.

construction industry. Manganaro was formed to operate as a unionized firm, and Sweeney Corporation was formed to operate as a nonunion firm, pursuant to a policy established by the Manganaro brothers and enforced by John Manganaro, the chief executive of the Manganaro Organization. Only John has the authority to change this policy. Sweeney commenced operations in 1979–1980, and installed primarily residential drywall. Manganaro did not commence operations until 1980–1981 and installed commercial drywall. Thereafter, the two operations grew and prospered side by side. There was never any attempt to conceal the fact that they were engaged in a double-breasted operation. The Manganaro Organization never operated in a manner to favor Sweeney over Manganaro or to siphon off work from Manganaro to Sweeney. Rather, the Manganaro Organization operated both companies under one guiding principle: to make use of the double-breasted operation to maximize the amount of work for the Manganaro Organization.

John Manganaro established guidelines for Manganaro and Sweeney in order to ensure compliance with the standards established in *Peter Kiewit Sons' Co.*[10] for a lawful double-breasted operation. Thus, John ordered that there be no interchange of field personnel or equipment between the two subsidiaries. John also retained ultimate control of the 1984 contract negotiations on behalf of Manganaro. John Hampshire, the president and nominal head of Manganaro, kept John Manganaro fully informed of the course of negotiations and forwarded all papers to him. All nonfield personnel of the Manganaro Organization are covered by the same benefit plans. Manganaro, a unionized firm, has the wages, benefits, and working conditions of its field employees governed by applicable collective-bargaining contracts. Personnel decisions, wages, and working conditions for Sweeney field employees are determined at the company level by Sweeney's president or his subordinates. Sweeney's field employees are covered by a health insurance plan which is their only benefit.

B. *The Union*

The Union has historically negotiated a single master contract with the Painting, Decorating and Drywall Finishing Contractors of Washington, D.C. and Vicinity (Association), a multiemployer association of construction industry employers covering employees of the signatory employers in connection with commercial drywall and finishing contracts in the Washington, D.C. area. The most recent collective-bargaining agreement between the Union and the Association, prior to the present case, was negotiated in early 1981 and was effective by its terms through May 15, 1984. The contract lists 25 painting and decorating contractors and 13 drywall finishing contractors as ''affiliates with'' the Union. Prior to commencing operations in the Washington, D.C. area, Manganaro was signatory to a collective-bargaining contract with Painters District Council No. 35 of Boston, Massachusetts. When Manganaro commenced its first job in the Washington, D.C. area, it contacted the Union, and on May 3, 1981, executed a ''Memorandum of Understanding'' with the Union. By that memorandum, Manganaro acknowledged that it was signatory to a contract with District Council No. 35, which required that Manganaro, when working outside of District Council No. 35's jurisdiction, would be bound by the 1981–1984 contract, including participation in the fringe benefit funds established by that contract.

C. *The Negotiations*

In 1983, in anticipation of the upcoming expiration of the contract, several signatory employers belonging to the Association sent letters to the Union stating that they were concerned over the need ''to reduce the competitive gap between Union/nonunion painters,'' and that in view of an anticipated Painters' pay raise, ''[t]he result is easily foreseen; the work would be assigned to nonunion contractors.'' Thereafter, the Union and the employers agreed to commence early contract negotiations, specifically to discuss a market recovery plan.[11] On November 8, 1983, the Union and some signatory employers met and discussed how to maintain their position in the construction market and become competitive. The employers said that they wanted to participate in the market recovery program. The Union said that it wanted to come up with a program which would make them competitive. No proposals were exchanged at this time. They noted that the ''Union market has shrunken'' and agreed to meet again on November 30, 1983.

At the November 30 meeting, 11 signatory contractors were present, including Manganaro. The employers presented a written ''contractor's proposal,'' which involved wage reductions, relaxation of work rules,

[10] 231 NLRB 76 (1977), affd. 595 F.2d 844 (D.C. Cir. 1979). There are three other reported decisions in this case: 206 NLRB 562 (1973), vacated and remanded sub nom. *Operating Engineers Local 627 v. NLRB*, 518 F.2d 1040 (D.C. Cir. 1975), affd. in pertinent part sub nom. S*outh Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976). They will be referred to both individually and collectively as the *Kiewit* case.

[11] In 1983, certain construction industry unions and signatory employer associations in the Washington area negotiated and executed the ''National Capital Area Construction Market Recovery Program.'' The thrust of the program was to effectuate a 20-percent reduction in labor costs, for the stated purpose of making the union contractors more competitive, and thereby ''to win back our rightful share of the construction market.'' The Union declined to participate in the program, in part because it did not contain a prohibition against double-breasting. It is evident from the contractors' letters to the Union that they were seriously concerned about the Union's refusal to participate in this program.

and greater employer flexibility in operation, all aimed at cost reduction. The Union rejected the proposals, and made certain proposals of its own, involving a 2-year contract with no wage increases except for cost-of-living increases in benefit funds and elimination of tool restrictions. The contractors did not accept the Union's proposal, and another meeting was scheduled for January 4, 1984.[12]

The parties met again on January 4 and February 15. Both sides submitted further proposals which were rejected. On February 22, the Union orally presented its market recovery plan, along with a ''work preservation'' clause that would prohibit double-breasting by signatory employers. The Union made it clear that it was presenting these proposals as a package deal, and that the employers could not have the former without the latter. The employers expressed pleasure that the Union was now presenting a market recovery plan which promised substantial reductions in labor costs, but they, particularly the drywall contractors, were very hostile to the double-breasting clause. The Union argued that the clause was needed to protect the union employees and not have their work siphoned off. The drywall contractors argued that the clause was illegal and that they could not survive with it. The Union then proposed, in the alternative, that there be a 1-year extension of the present contract with a 3-percent wage reduction, 4-year apprenticeship program, and deletion of double-time pay. The employers rejected this proposal.

With respect to the work-preservation clause, the Union stated that the clause was for those firms in the room that had double-breasted operations. The union representative then walked around the room and placed his hands on the shoulders of certain contractors, including the representative for Manganaro. It is undisputed that the Union never mentioned Sweeney, and that it never asked Manganaro or any parent company of Manganaro to take any action with respect to Sweeney.

After the Union's presentation of its package proposal, the drywall contractors requested that the Union meet with them separately. Their spokesman explained that they were not asking for a separate contract, but that they wanted to address the drywall contractors' needs and saw no point in their sitting through discussion of matters that were of no interest to them. The Union agreed to the request. The Union's package proposal was presented in writing at the March 14 negotiating session.

By May 15, the expiration date of the parties' contract, the painting contractors had agreed to accept the work-preservation clause, and, as a result, the Union and the painting contractors reached agreement on the terms of a contract. The Union and the drywall contractors met again on May 15. The contractors were willing to accept the market recovery proposal without the work-preservation clause. The Union rejected this proposal. At this point the parties agreed they were at impasse. From May 16, until it was enjoined in a Section 10(l) proceeding in November 1985, the Union refused to refer members to the jobsites of Manganaro and the other employers who refused to sign the ratified contract.[13]

[12] All dates hereafter are in 1984, unless otherwise indicated.

III. THE JUDGE'S SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The judge stated in his supplemental decision that he would not reconsider his findings in his initial decision that the secondary boycott allegations be dismissed because (1) the evidence failed to indicate that the Union struck Manganaro for any object other than to obtain a contract containing the clause at issue, and (2) that the Manganaro Organization companies, including Manganaro and Sweeney, constituted a single employer under the Act. The judge therefore addressed only the issue of whether the clause falls within the general proscription of Section 8(e).

In making his determination on this issue, the judge relied on the Board's analytical framework first articulated in *General Teamsters Local 982 (J. K. Barker Trucking Co.)*, 181 NLRB 515, 517 (1970), affd. 450 F.2d 1322 (D.C. Cir. 1971). There, the Board stated that:

> [I]f the meaning of the clause is clear, the Board will determine forthwith its validity under 8(e); and where the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law. On the other hand, if the clause is ambiguous, the Board will not presume unlawfulness, but will consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner. In the absence of such evidence, the Board will refuse to pass on the validity of the clause. [Footnotes omitted.]

Applying this analysis the present case, the judge found that the meaning of the clause is clear, and it is not clearly unlawful on its face. Thus, the judge found that the clause does not *in fact* fall within the proscription of Section 8(e). The language of the clause proposed by the Union stated, in pertinent part:

> Section 1. To protect and preserve, for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement, and to prevent any device or subterfuge to avoid the protection and preservation of

[13] The union contract provided that the Union ''shall be the sole and exclusive source of referral of applicants for employment.''

> such work, it is agreed as follows: If the Contractor performs on-site construction work of the type covered by this Agreement, under its own name or the name of another, as a corporation, company, partnership, or other business entity, including a joint venture, wherein the Contractor, through its officers, directors, partners, owners or stockholders exercises directly or indirectly (including but not limited to management, control, or majority ownership through family members), management, control or majority ownership, the terms and conditions of this Agreement shall be applicable to all such work.

The judge first found that the clause, in its preamble, purports to have a lawful purpose, that is, to ''protect and preserve'' unit work. Second, the judge found that the clause applied only to unit-type work in that it addressed commercial painting and drywall finishing contracts in the Washington, D.C. metropolitan area. Third, the judge found that the clause applied to such work only when performed by the signatory employer through a business entity which is under ''management, control or majority ownership'' of the signatory employer. The judge stated that the clause is not triggered where an affiliation, a subsidiary-to-parent relationship, or ''ownership interests'' falls short of majority ownership. Finally, the judge concluded that the only effect of such work performance is that the terms and conditions of the contract will be applied to ''*that work*.'' In sum, the judge found, the clause does not apply to the terms and conditions of employment for anything other than commercial painting and drywall finishing contracts in the Washington, D.C. metropolitan area. The judge reasoned that in such a situation the Union would have a primary dispute with the signatory employer. Moreover, the judge stated, if an employer ''exercises directly or indirectly . . . management, control or majority ownership'' over another entity, then the signatory employer presumptively has the right or power to control assignment of work by that entity.

The judge acknowledged the possibility that the Board might disagree with his finding and conclude that the clause is unlawful on its face, which would end the inquiry. The judge also noted, however, that the Board might find the clause ambiguous and, accordingly, he considered extrinsic evidence to determine its legality. In doing so, the judge reached four conclusions: (1) Sweeney was not the alter ego of Manganaro, (2) the employees of Manganaro and Sweeney do not constitute a single bargaining unit, (3) Sweeney's operations did not pose a threat to preservation of bargaining unit work, and (4) viewed from the standpoint of the Union's intent in the context of the multiemployer bargaining unit, the Union's motive in seeking the clause was preservation of unit work, and the Union had reason to believe that double-breasted operations by other signatory employers caused or threatened loss of unit work.

With respect to his first conclusion, the judge found that Sweeney was not the alter ego of Manganaro because Sweeney was not the ''disguised continuance'' of Manganaro. Sweeney was formed and commenced operations before Manganaro, as a nonunion company. After Manganaro commenced operations, both companies prospered, side by side. In 1983–1984, John Manganaro, for reasons unrelated to the present case, began to scale down the operations of both Sweeney and Manganaro. He believed that both companies were in a rapid growth pattern which would prevent them from achieving their projected goals. He reduced the operations of Sweeney to a greater extent than those of Manganaro. The evidence fails to indicate that the Manganaro Organization ever bid for a job through Sweeney rather than Manganaro in order to avoid contractual terms and conditions of employment. Rather, the determination was based on which company was more likely to get the work.

Usually, the general contractor only invited one of the companies to bid. Often, the drywall contractors knew before hand whether a job was likely to go union or nonunion and bid or refrained from bidding accordingly. Although bidding activity was coordinated and controlled by the Manganaro Organization, each company bid separately for jobs. Thus, if the general contractor on a job was signatory to a union contract, Manganaro would bid. If Sweeney, by virtue of its nonunion status, was more likely to get the work, Sweeney would bid. Determination of which company would submit a bid was not based on mutual scheduling of work or other efforts to coordinate the operations of Manganaro and Sweeney. Manganaro never subcontracted to Sweeney. Sweeney, however, sometimes did subcontract portions of its work to Manganaro or other drywall contractors. In sum, the judge found that the Manganaro Organization regarded Manganaro as its flagship company in the Washington Metropolitan area and had no intention of using Sweeney as a means of displacing Manganaro.

The judge also found that the employees of Manganaro and Sweeney did not constitute a single bargaining unit, as there was no effort to siphon off work from one to the other. Although bidding was coordinated and controlled by the Manganaro Organization, each company bid separately for jobs. On those few occasions when Manganaro performed work subcontracted from Sweeney, there was no greater jobsite coordination between them than there would be between independent contractors at the site.

The judge further found that Sweeney's operations did not pose a threat to preservation of bargaining unit work, i.e., the work of Manganaro's employees per-

forming drywall work. The pattern and volume of work of Manganaro differed significantly from that prevailing among union painting and drywall contractors in the Washington, D.C. area during 1980–1984. As noted, Manganaro was new to the area, having commenced business about a year after Sweeney. Therefore, viewing Manganaro as a unit, there was no prior basis, when comparing its operations with those of Sweeney, for determining what constituted unit work. During 1980–1983, Manganaro, like Sweeney, enjoyed phenomenal growth. Total reported hours worked by Manganaro unit employees rose from about 976 in 1980 to 16,744 in 1982, and 36,054 in 1983. Sales volume rose steadily, outstripping Sweeney. In 1979–1980, in millions of dollars, Sweeney's sales volume totaled $1596, while Manganaro's totaled $1757. In 1982–1983, Sweeney totaled $4,159 million, while Manganaro totaled $12,331 million in sales.

The fourth finding made by the judge was with respect to the Union's subjective intent in seeking the clause at issue. The judge reasoned that the Union did not have one reason for wanting Manganaro to sign a contract with the clause and a different reason when dealing with the other union contractors. He therefore determined to address the Union's motivation in connection with the issue of work preservation in the multiemployer unit. The judge first disagreed with the General Counsel's contention that Manganaro and Sweeney operated in different markets. The judge found that until the mid-1970's, there was a fairly clear delineation between a union market and a nonunion market in the Washington area. This line, however, became increasingly blurred from the mid-1970's through 1984, at which time the judge found that Manganaro and Sweeney were frequently found bidding in what might have traditionally considered the other's market, i.e., Sweeney bid large commercial jobs that Manganaro traditionally performed, and Manganaro found itself bidding on some traditionally nonunion jobs.

The judge then found that, as with Sweeney and Manganaro, the lines between traditionally union and nonunion work became increasingly blurred in the multiemployer unit. Union painting and drywall contractors could not compete price-wise with nonunion contractors. The Manganaro operations manager testified that on nonspecialty work, Manganaro's bid was usually nearly 20 percent higher than that of nonunion firms bidding for the same job. The judge stated that contractors engaged in double-breasted operations, knowing they could work through one wing or another except on all union jobs, showed little inclination to press for contract concessions. As a result of these developments, the volume of union drywall work remained constant during a period of time in the late 1970's and early 1980's when there was a construction boom in the Washington area, including drywall work. In absolute terms, the volume of union work remained about the same, but the percentage of work done by union employees dropped sharply.

Accordingly, the judge concluded that the Union demanded and struck for the clause at issue for the object of preserving work historically performed by painting and drywall employees of signatory employees. The demand and the strike were not ''tactically calculated'' at organizing the employees of Sweeney or any other nonunion wing of a double-breasted operation. From the beginning, according to the judge, the Union demonstrated its primary goal.

IV. ANALYSIS

A. *The Clause is not Unlawful on Its Face*

Section 8(e) of the Act generally prohibits those collective-bargaining agreements which require employers to cease doing business with any other person.[14] Section 8(b)(4)(A) prohibits a union from (i) engaging in, or inducing or encouraging employees to engage in strikes or refusals to perform services, or (ii) threatening, coercing, or restraining persons engaged in commerce, where in either case an object of such conduct is to force or require an employer to enter into an agreement which is prohibited by Section 8(e). Section 8(b)(4)(B) prohibits a union from forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person.

Although Section 8(e) does not by its terms distinguish between primary and secondary activity, the Supreme Court has held that ''Congress intended to reach only agreements with secondary objectives.''[15] Similarly, Section 8(b)(4) was designed to protect employers who are neutrals in a labor dispute which is not their own.[16] The Court has refused, however, to read

[14] Sec. 8(e) provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void[.]

Sec. 8(b)(3) requires labor organizations to bargain in good faith with the employers of employees whom they represent. According to the complaint, the Union violated Sec. 8(b)(3) by bargaining to impasse over the anti-dual-shop clause, which the complaint asserts was an unlawful, and hence nonmandatory, subject of bargaining. Thus, the question whether the disputed clause violates Sec. 8(e) is dispositive of the 8(b)(3) allegation as well.

[15] *NLRB v. Longshoremen ILA*, 447 U.S. 490, at 504 (1980) (*ILA I*), citing *NLRB v. Pipefitters*, 429 U.S. 507, 517 (1977); *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 620, 635 (1967).

[16] *National Woodwork*, 386 U.S. at 625–626.

Section 8(b)(4) as prohibiting primary activity which may impact on a neutral employer, stating that ''however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective.[17]

The General Counsel and our dissenting colleague allege that the clause is secondary in nature because it would require Manganaro to cease doing business with entities that are separate persons under the Act and would prospectively prohibit Manganaro from doing business through another company not signatory to the clause. The General Counsel and the dissent further argue that the clause is not a valid work-preservation clause but rather is designed to affect the labor relations of a separate employer.

In *ILA I*, the Supreme Court noted that ''whether an agreement is a lawful work preservation agreement depends on 'whether, under all the surrounding circumstances, the Union's objective was preservation of work for [bargaining unit] employees, or whether the [agreement was] tactically calculated to satisfy union objectives elsewhere . . . . The touchstone is 'whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-vis* his own employees.'''[18] The Court in *ILA I* then set forth a two-part test to determine the lawfulness of a work-preservation agreement. ''First, [the agreement] must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so-called 'right of control' test[.]'' The Court explained that ''[t]he rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work.''[19] Both of these tests are met by the clause at issue here.

Turning first to the right of control test, we agree with the judge that the clause is not unlawful on its face and, accordingly, that under *J. K. Barker Trucking*, supra at 517, we ''interpret it to require no more that what is allowed by law.'' The General Counsel and our dissenting colleague contend that the clause, on its face, fails to meet the right of control test because it could and would apply to separate, though commonly owned, companies over which the signatory has no power to assign work. The General Counsel and the dissent further contend that the clause is facially unlawful because it would apply to two tangentially related companies performing the work at issue whenever the person running either the contractor or the targeted entity is also even a small shareholder or an incidental director of the other company. Thus, the General Counsel and our dissenting colleague argue that the clause would have overly broad ''downstream'' applications whenever a signatory employer has a nonunion subsidiary and ''upstream'' applications from a nonsignatory entity performing work which attribute performance of the work to a signatory employer. For the reasons below, we find these arguments unpersuasive.

By its terms the clause at issue here applies to the ''Contractor'' if it ''performs . . . work . . . covered by this Agreement, under its own name or the name of another, . . . wherein the Contractor . . . exercises directly or indirectly . . . management, control, or majority ownership.'' The judge found, and we agree, that the requirement that the signatory contractor exercises ''management, control, or majority ownership'' over another entity presumptively means the contractor has the right or the power to control the assignment of work of that entity's employees. In addition, the clause by its terms states that it applies only if the signatory ''exercises'' such control. This is more than potential authority; it refers to the actual or active control of the work. Finally, the clause by its terms limits its objective to work which the contractor ''performs.'' This further indicates that the clause requires the contractor to have the authority to control the work; otherwise, the work done through the device of another entity would not be work the contractor performs. Thus, we disagree with the General Counsel and our dissenting colleague and find that the language of the clause applies only when the signatory contractor has the right of control over the work in question. In giving a more expansive reading to the clause, the General Counsel and our dissenting colleague lose sight of these limitations.[20]

We agree with the judge that the clause is not triggered merely by the fact of an affiliation, subsidiary and parent relationship, or ownership interest short of

[17] Id. at 627.

[18] 447 U.S. at 504, citing *National Woodwork*, supra at 644–645.

[19] Id. at 504–506.

[20] This case is distinguishable from the Board's decision in *Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023 (1993), on precisely these grounds. In *Alessio*, the union sought an anti-dual-shop clause as a condition of reaching agreement with the employer. The clause there read:

> In the event that the partners, stock holders or beneficial owners of the company form or participate in the formation of another company which engages or will engage in the same or similar type of business enterprise in the jurisdiction of this Union and employs or will employ the same or similar classifications of employees covered by this Collective Bargaining Agreement, then that business enterprise shall be manned in accordance with the referral provisions herein and covered by all terms of this contract.

This clause is not limited to situations in which common control is demonstrated. In the present case, by contrast, the clause requires both that the contractor perform the work and exercise management, control, or majority ownership over the other entity involved. Because of this distinction, the present case does not, as our dissenting colleague maintains, overrule *Alessio*.

majority ownership. The clause does not, as asserted by the General Counsel and our dissenting colleague, apply to virtually any participation by principals of the signatory in the operations of a nonsignatory entity, regardless of the lack of common control of the two entities. Contrary to the contentions of the General Counsel and our dissenting colleague, the clause does not apply merely because a person who runs one entity has a small number of shares of stock in or holds a seat on the board of directors of the other entity. Rather, it applies to the *signatory contractor* who *performs* and *exercises* control over the work, not to tangential ownership or management. Furthermore, the language in the clause referring to the contractor's exercise of control ''through its officers, directors, partners, owners or stockholders'' does not define or broaden the requirement that the contractor must exercise management, control, or majority ownership but instead is a tool ''to prevent any device or subterfuge to avoid the protection and preservation of [unit] work,'' and then only when the authority of the officers, etc., constitutes the same authority as that of the contractor.

The clause, by its terms, applies to indirect as well as direct management, control, or majority ownership and to that extent does have upstream and downstream applications, but not in the manner asserted by the General Counsel and our dissenting colleague. Indirect control would, for example, make the clause applicable ''downstream'' to a separate subsidiary of the signatory contractor or ''upstream'' when the targeted entity's and the signatory contractor's relationship was through a holding company to which both the signatory and the target are subsidiaries. But it would do so only if there is a chain of management, control, or majority ownership involving the signatory, holding, and targeted entities, and as discussed above, the work in question was ''performed'' by the signatory through the target.

Accordingly, we find that the clause has ''downstream'' and ''upstream'' applications only when there is a substantial commonality or interrelationship of management, control, or ownership flowing between the signatory contractor and the other (targeted) entity. That such a chain of control may be indirect does not mean that it would apply merely because there is some tangential overlap of ownership or management. Rather, the clause requires that the signatory must have effective, albeit indirect, management, control, or majority ownership. In sum, that the clause would apply to indirect control does not mean that the signatory contractor does not have the right of control over that work.

The General Counsel and the dissent further argue that the clause is secondary because the clause would apply to the potential, as opposed to actual, control over the assignment of work. Citing *Los Angeles Newspaper Guild Local 69 (Hearst Corp.)*,[21] the General Counsel contends that mere potential power to assign work does not meet the right of control test. The judge questioned this assertion in his initial decision[22] and his supplemental decision.[23] We, however, conclude that the General Counsel's assertion is misplaced in light of our finding above that the clause requires the actual, active ''exercise'' of the right of control. Based on this finding, *Hearst Corp*., in which such evidence of actual control was lacking, is distinguishable.

Turning next to the purpose of the clause, we find, in agreement with the judge, that the objective of the clause is to preserve work traditionally performed by unit employees. The preamble to the clause states that its objective is to ''protect and preserve, for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement.'' Nothing in this language or the language that follows indicates that the clause seeks anything other than ''the preservation of work traditionally performed by the employees represented by the union.''[24] The objective of the clause is also revealed by the nature of the work the union is seeking to preserve. In *ILA I*, the Supreme Court stated that the most basic question in analyzing a work preservation defense is ''[w]hat is the 'work' that the agreement allegedly seeks to preserve?''[25] The Court stated that ''[i]dentification of the work at issue . . . requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed circumstances.''[26]

Here, we find that the work that the clause seeks to preserve is the commercial drywall work traditionally performed by the unit employees of the signatory employer in the geographic area covered by the collective-bargaining agreement. The changed circumstance that the Union is reacting to is the encroachment of nonunion shops on work traditionally performed only by union shops. The way in which the clause seeks to accomplish the preservation of unit work is by requiring a contractor who performs the work through another entity to apply the terms of the collective-bargaining agreement. This approach seeks to ensure that a contractor cannot siphon off traditional unit work to a nonunion shop in order to avoid its collective-bar-

[21] 185 NLRB 303, 304 (1970), enfd. per curiam 443 F.2d 1173 (1971).

[22] Relying on *Berman Enterprises v. Longshoremen ILA Local 333*, 644 NLRB F.2d 930 (9th Cir. 1980), cert. denied 454 U.S. 965 (1981).

[23] Relying on *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752 (1984).

[24] This is how the Court summarized this test in *ILA I*, supra at 504.

[25] Id. at 505.

[26] Id. at 507.

gaining agreement with the union,[27] and thus the legitimate expectation of employees who would otherwise be deprived of contractual benefits.[28]

Also illustrative of the Union's primary goal is the fact that the clause is not a union signatory clause that seeks to organize the employees of the nonunion entity. Indeed, because the nonunion entity is not a party to the clause it has no direct application to such entities. Rather, the clause applies only when the signatory contractor performs unit work through a nonunion entity, and even then the clause applies only to the unit work performed. All other work performed by the nonunion entity is left unaffected.

Such a situation is truly one of work preservation because the Union seeks no more than that which it is lawfully entitled to seek: the protection of work traditionally performed by bargaining unit employees. To allow an employer to perform bargaining unit work through another entity at less than contract terms in order to lower labor costs would effectively allow an employer to siphon off that work to a more attractive alternative. What the clause requires is simply that if an employer performs work covered by the collective-bargaining agreement, that work must be performed under the terms of the collective-bargaining agreement.

A union could lawfully seek even more than what the clause requires and demand that the employer never perform unit work through another entity. The fact that the clause requires something less that what a union would be fully entitled to does not make the clause unlawful. Such a situation is similar to that discussed in *ILA I*, supra at 505. There the Court found that one way to preserve the work of unit employees in the face of change in their industry ''is simply to insist that the innovation not be adopted and that the work be done in the traditional way.'' The Supreme Court added that ''the protection Congress afforded to work-preservation agreements cannot be limited solely to employees who respond to change with intransigence.'' The work-preservation doctrine, then, must also apply to situations where a union attempts to accommodate change while preserving as much of the traditional work patterns as possible.[29]

The clause here, although not addressing a technological change as in *ILA I*, does address the fact that certain union employers in the construction industry do ''form[], acquire[], or maintain[] a separately managed nonunion company that performs work of the same type as that performed by the affiliated union company.'' [30] In some situations, employers use this separately managed company, or dual-shop, to perform work of the type covered by the union contract at a lower cost. Seeking to preserve this work for unit employees is a legitimate goal to preserve work traditionally performed by unit employees.

The General Counsel also argues that this case is governed by the Board's decision in *Sheet Metal Workers Local 91 (Schebler Co.)*,[31] asserting that the clause there was nearly identical in scope to the one at issue here. We disagree. In that case, the union sought an ''Integrity Clause'' to ensure that employers were either 100 percent union or 100 percent nonunion. The clause required that the signatory employer force related firms or affiliates to grant employees the wages, hours, and working conditions of union agreements under penalty of having its own union agreement rescinded. The judge's decision, adopted by the Board, found a violation of the Act because, inter alia, the clause was not limited to protecting bargaining unit work, and that there was no attempt to limit the clause to work in the geographic location of the union shops. Finally, we note that in *Schebler*, the union did not raise a work-preservation defense. These facts distinguish the present case from *Schebler*.

Here, the clause is much more narrow in scope than the clause in *Schebler* and, in fact, contains a geographic limitation to the application of the clause. The language of the clause in the present case applies only when ''the Contractor performs on-site construction work of the type covered by this Agreement[,]'' that is, commercial painting and drywall finishing work in the Washington, D.C. area. This specific limitation to unit-type work indicates that the clause is not directed at acquiring work not traditionally performed by the unit employees or at organizing the employees of another employer. Inherent in this reference to the agreement is a limitation of its application in terms of both

[27] We adopt the judge's finding that the clause is not unlawful on its face. We also agree with the judge's additional finding that, even if the clause is ambiguous on its face, the extrinsic evidence establishes that the clause is lawful. In making this finding, the judge concluded that the evidence fails to indicate that the operations of Sweeney posed a threat to bargaining unit work, but that a real threat to bargaining unit work existed in the industry, and the Union's subjective intent in proposing the clause on an industrywide basis was one of work preservation.

We find that there need not be an actual threat to justify a work-preservation clause, because the anticipation of a threat can by itself motivate a desire to preserve the work traditionally performed by the unit employees. Even if there were no actual threat to the work performed by the unit employees of Manganaro, the clause here was proposed industrywide in an area in which the threat of dual shops was very real to many union shops in the industry. As observed by the judge, when looking to the Union's subjective intent, one cannot presume that it had one motive of work preservation in presenting this clause to certain employers and another motive in presenting it to Manganaro.

[28] Cf. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), in the somewhat analogous arena of successorship. See also Stephen F. Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation*, 1987 Wis. L. Rev. 67.

[29] Id. at 505–506, footnote omitted.

[30] *Alessio Construction*, supra at 1023.

[31] 294 NLRB 766 (1989), enfd. in relevant part 905 F.2d 417 (D.C. Cir. 1990).

the type and the geographic area of the work in question. This limitation ensures that the clause reaches only those employers performing work of the type traditionally performed by unit employees in the union's jurisdiction and avoids a situation where the union and nonunion shops in question are geographically separate, thereby negating a connection between the labor relations of the two entities. Further, the application of the clause requires only that the terms and conditions of the contract will be applied to that ''unit-type'' work and leaves unaffected any other work being done. Finally, the Union here has presented substantial evidence that work preservation was the motivation behind the clause. Thus, the clause is lawful on its face, and the Union has demonstrated that its objective is one of work preservation.

This reading of the clause is supported by the Sixth Circuit's interpretation of a virtually identical clause in *Becker Electric Co. v. Electrical Workers IBEW Local 212*.[32] There, the court found that ''[t]he clause only addresses efforts by the primary employer to avoid the CBA by performing union jobs through other entities it controls.'' In *Becker*, the union and the employers, Bertke Electric and Stapleton Electric, were parties to successive collective-bargaining agreements. During the negotiations for a new contract in 1984, the union demanded that a work-preservation clause be included in the contract, in order to combat the double-breasting it feared would diminish its job opportunities.

There was evidence that Bertke Electric had engaged in double-breasting. Bertke was owned by a holding company, Bertke Investments, which owned Belemech Inc., a nonunion electrical contracting company, and Bertke Services as well. All of these companies were controlled by the Bertke family and had interlocking directorships. The union eventually struck Bertke over its failure to reach an agreement that included the work-preservation clause. The employers filed suit in the U.S. District Court, alleging the strike was unlawful because the purpose was to force the employers to agree to the work-preservation clause, which they argued violated Section 8(e) of the Act.

The employers argued that the clause had unlawful secondary effects because it would operate to apply the terms of the contract to neutral, although related, third parties.[33] The court rejected this argument, stating that work-preservation clauses do not violate the Act merely because a neutral employer is to some degree affected.[34] The correct inquiry, the court held, is ''whether the clause was 'primary' or 'directed to the labor relations between the contracting employer and its union employees . . . . Thus, the impact on neutral employers is not relevant because a bona fide effort to preserve jobs in the face of a threat is a primary objective.''[35]

The employers there also argued that the clause was unlawful because it sought to acquire work rather than to preserve work. In support of this position, they described a separate ''merit'' or nonunion market that exists separately from the unionized market. The employers asserted that the clause sought to acquire the work of the nonunion shop, Belemech, and that this work would never have gone to Bertke in the first place.

The court rejected this position as well, stating that the proper focus of the analysis is not the union/merit shop distinction, but rather the traditional work patterns that the parties are allegedly seeking to preserve, and how the agreement seeks to accomplish that result under the changed circumstances. The court stated that ''[t]he growth of non-union companies performing work which was traditionally performed by union companies is precisely the environment where work preservation clauses are most essential.''[36] The court concluded that because the clause was a response to the threat the union perceived from double-breasting, the union had demonstrated that its primary objective was one of work preservation, and therefore it had not violated the Act.[37]

The General Counsel and our dissenting colleague assert that *Becker* is inconsistent with the Board's decision in *Schebler*, because in *Schebler* the Board focused on whether the two entities were separate per-

[32] 927 F.2d 895, 896 (1991). The clause in *Becker* reads:

> (a) In order to protect and preserve, for the employees covered by this Agreement, all work heretofore performed by them and in order to prevent any devise or subterfuge to avoid the protection and preservation of such work, it is hereby agreed as follows: If and when the Employer shall perform any work of the type covered by this Agreement, under its own name or the name of another, as a corporation, company partnership or any other business entity, including a joint venture, wherein the employer, through its officers, directors, partners, or stockholders, exercises either directly or indirectly management, control or majority ownership the terms and conditions of this Agreement shall be applicable to all such work.

[33] Id. at 898. In *Becker*, the plaintiffs framed the question in terms of whether the two entities constituted a single employer under the standards of the *Kiewit* case. In the present case, the General Counsel excepts to the judge's finding that the Manganaro Organization constitutes a single employer. We find it unnecessary to pass on this issue because we agree with the court in *Becker* that single employer status is inapplicable to the analysis of the work-preservation defense. Single-employer status may be relevant to an analysis of whether a work-preservation clause is lawfully applied, but that issue is not before us here. See also *Teamsters Local 560 (Curtin Matheson)*, 248 NLRB 1212 (1980).

[34] Id., citing *National Woodwork* at 627.

[35] Id., citing *National Woodwork* at 640.

[36] *Becker Electric Co.*, supra at 899.

[37] Our dissenting colleague seeks to distinguish *Becker* from the present case on the basis that in *Becker* the court found that a threat to the unit work existed and, here, we have only the anticipation of a threat. This distinction is not relevant because, as we have stated above, the anticipation of a threat can, by itself, motivate a desire to preserve the work traditionally performed by the unit employees. See fn. 26, supra.

sons and therefore entitled to the protections in the Act against secondary activity. We find no such inconsistency in light of the factual distinctions between the cases, particularly the fact that in *Schebler* the union did not raise a work-preservation defense.

In addition, a clause is not secondary if it is not directed at a neutral employer. In *National Woodwork*, the Court stated that a union's activity aimed at employers performing the work of the primary employer's striking employees did not violate Section 8(b)(4)(A) because the secondary employer had ''entangled himself in the vortex of the primary dispute.''[38] Here, an employer to whom the contractor would divert his work in order to escape the contract is likewise not a neutral employer, because it too would have become entangled in the vortex of the primary dispute between the contractor and the union.

B. *Conclusions*

The antidouble-breasting clause at issue here is not unlawful on its face, because it meets both tests set forth in *ILA I*. It purports to have a lawful purpose, and it applies to situations where the employer has the right of control over the work performed. Even if the clause was ambiguous, however, we find that the extrinsic evidence establishes its lawful primary purpose. Accordingly, there is no violation of Section 8(b)(3), because the Union did not bargain in bad faith by seeking a lawful antidouble-breasting clause. In addition, there is no violation of Section 8(b)(4)(A), because the Union did not seek to force the Employer to enter into an agreement prohibited by Section 8(e). Similarly, there is no violation of Section 8(b)(4)(B) because the Union did not unlawfully seek to cause the Employer to cease doing business with any other person. Accordingly, absent any evidence that the clause was enforced or was intended to be enforced in an unlawful manner we find that the clause is a lawful work-preservation clause, and we dismiss the complaint.[39]

ORDER

The complaint is dismissed.

MEMBER COHEN, dissenting. My colleagues have this day taken the significant step of sanctioning an unlawful secondary clause and have, *sub silentio*, overruled a 1993 case proscribing activity like that engaged in here. In so doing, they have struck a blow against perfectly lawful double-breasted operations.

Contrary to my colleagues, I find that the Respondent's proposed anti-dual-shop clause is proscribed under Section 8(e) and is not protected by the construction industry proviso. Accordingly, I would reverse the judge and find that the Respondent violated Section 8(b)(3)(4)(i) and (ii)(A) by insisting, as a condition to reaching an agreement, that Manganaro agree to this clause, and by refusing to refer its employee-members to Manganaro's jobsites.[1]

Initially, I agree with my colleagues that, under *J. K. Barker Trucking*,[2] the Respondent's anti-dual-shop clause[3] is clear on its face, making resort to extrinsic evidence unnecessary. However, unlike the majority, I find that the proposed clause—which falls within the literal proscriptions of Section 8(e)[4]—is facially overbroad and expressly encompasses separate legal entities over which signatory employers lack control. Thus, the clause here, on its face, requires the signatory to sever all ties to any nonsignatory company, unless the nonsignatory agrees to be bound by the contract. And, it applies in circumstances where the signatory employer is not even, in law, a single employer with the nonsignatory employer.[5] Further, the majority holds that the clause is limited in its application to situations where the signatory has actual control of the work. In my view, however, the clause defines what constitutes control, and the definition encompasses far less than actual control. I find that the Respondent's anti-dual-shop clause clearly has an unlawful secondary objective. Indeed, I find this conclusion mandated

[38] 386 U.S. at 627.

[39] We emphasize that our finding that the clause itself does not violate the Act because a lawful interpretation of the clause exists on its face does not preclude the Board from finding a violation of the Act if the clause is subsequently applied in an unlawful manner. Further, we note that, in light of our finding that the clause is a primary work-preservation clause, we need not pass on whether the clause would be protected under the construction industry proviso to Sec. 8(e).

[1] I find it unnecessary to pass on the 8(b)(4)(i) and (ii)(B) allegations. The remedy for these allegations would not differ in any material respect from that for the 8(b)(4)(A) violations.

[2] *General Teamsters Local 982 (J. K. Barker Trucking Co.)*, 181 NLRB 515, 517 (1970), enfd. 450 F.2d 1322 (D.C. Cir. 1971).

[3] The proposed clause specified that:

> Sec. 1. To protect and preserve, for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement, and to prevent any devise or subterfuge to avoid the protection and preservation of such work, it is agreed as follows: If the Contractor performs on-site construction work of the type covered by this Agreement, under its own name or the name of another, as a corporation, company, partnership, or other business entity, including a joint venture, wherein the Contractor, through its officers, directors, partners, owners or stockholders exercises directly or indirectly (including but not limited to management, control, or majority ownership through family members), management, control or majority ownership, the terms and conditions of this Agreement shall be applicable to all such work.

[4] Thus, the anti-dual-shop clause, by its express terms, constitutes an agreement by signatory employers to ''cease doing business'' with other persons or employers within the meaning of Sec. 8(e).

[5] Indeed, the clause as written (and as admitted to by its drafter) is not limited in its application to employers meeting the test for single-employer under *Peter Kiewit. South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976). As such it is clearly secondary. *Sheet Metal Workers Local 80 (Limbach Co.)*, 305 NLRB 312, 314 fn. 5 (1991).

by the Board's decision in *Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023 (1993).

In *Alessio*, the Board held that any ''attempt to impose a contract on separate employers of employees in 'work units far removed from the contractual unit' is plainly secondary and is unlawful under Section 8(e), absent proviso protection.'' Id. at 1025, citing *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB 766, 770 (1989), enfd. in relevant part 905 F.2d 417 (D.C. Cir. 1990), on remand 305 NLRB 1055 (1991). In *Alessio*, the union insisted on an anti-dual-shop clause that required that its contract be extended to companies that had, as participants in their formation, ''partners, stock holders or beneficial owners'' of a signatory employer, provided that the companies engaged in ''the same or similar type of business enterprise'' or employed ''the same or similar classifications of employees'' as those covered by the signatory's collective-bargaining agreement. The Board correctly found that this clause, by its terms, was not restricted to situations where the signatory had actual control over the other entities, or where the signatory had diverted unit work to them. Rather, the clause in *Alessio* mandated extension of the signatory's contract to separate legal entities with which the signatory had a business relationship consisting solely of common ownership and the performance of similar work. Because, under settled Board law, majority ownership is insufficient to establish single-employer status,[6] the Board found that the clause was secondary and unlawfully sought to apply the contract to companies over which the signatory lacked control.[7]

The Respondent's anti-dual-shop clause is not identical to that in *Alessio*. Rather, the clause here has self-serving ''protect and preserve'' preamble language ostensibly making it appear less offensive. However, the operative provision of the clause—which applies regardless of the preamble— has precisely the same vice of imposing the Respondent's contract on entities that signatory employers do not control.[8] It does so in two ways. First, by its express terms, the Respondent's clause applies where an officer, director, partner, owner, or stockholder of a *signatory* employer exercises, directly or indirectly, ''management, control, or majority ownership'' of another company performing the same type of work as the signatory.[9] Since ''management, control *or* majority ownership'' are disjunctive terms, the clause extends to any entity performing contract-type work where the signatory exercises, even ''indirectly,'' majority ownership in the entity, even in the absence of common management, control of labor relations, or diversion of work which the signatory is, in fact, empowered to assign. This ''lack of control'' is precisely the flaw that the Board found fatal in *Alessio*.[10] Indeed, as in *Alessio*, the instant clause would apply based on common ownership alone, and is not limited to situations where common control or diversion of work is alleged. To the contrary, it applies here where there has been no diversion of work. Similarly, the anti-dual-shop clauses in both cases do not

[6] See, e.g., *Los Angeles Newspaper Guild Local 69 (Hearst Corp.)*, 185 NLRB 303, 304 (1970), enfd. per curiam 443 F.2d 1173 (9th Cir. 1971). The Board has applied the same test for determining relatedness of companies in double-breasting situations. *Sheet Metal Workers Local 80 (Limbach Co.)*, 305 NLRB 312, 314 fn. 5 (1991); *Carpenters Local 745 (SC Pacific)*, 312 NLRB 903 (1993), enfd. in unpublished decision *Carpenters Local 745 v. NLRB*, No. 93-71038 (9th Cir., Dec. 19, 1995).

[7] Specifically, the Board found that the anti-dual-shop clause in *Alessio* came within the proscriptions of Sec. 8(e) because it: (1) was calculated to cause Alessio to sever its ownership relations with affiliated firms that sought to remain nonunion, or to forbear from relationships with such entities, even though the latter were separate employers under court-approved Board law; and (2) was aimed, not at preserving the work of Alessio's union-represented employees, but at affecting the labor relations of nonunion companies which *Alessio* did not control.

In finding the clause prohibited under Sec. 8(e), the Board in *Alessio* rejected the judge's interpretation of the clause as applying only to double-breasted companies to which the signatory had diverted work. Instead, the Board found that the clause would equally apply to work obtained from clients that had never intended to contract with Alessio.

[8] *Schebler Co.*, supra, supports my view. In *Schebler*, the Board found that a proposed ''integrity'' clause was unlawful where it required the signatory to force related firms or affiliates to abide by the terms and conditions of the union agreements or have their own union agreements rescinded. Because the integrity clause, as written, applied even where the signatory and affiliates/related companies were not single employers under *Peter Kiewit*, supra, as well as to work outside the signatory's bargaining unit, it violated Sec. 8(e). 294 NLRB at 771.

Likewise, in *Limbach Co.*, supra, the Board squarely held that common ownership between a union and nonunion breast does not, alone, establish a primary dispute. Because the union's true object in *Limbach* was to extend its contract to the nonunion wing, despite its lack of control over the nonunion entity, the Board found that the union had engaged in unlawful secondary activity. 305 NLRB at 313–314.

[9] The is the so-called ''downstream'' application of the clause.

[10] The flaw in *Alessio* was that the challenged clause was not limited to situations where common control by the signatory employer was demonstrated. Here, too, the Respondent's anti-dual-shop clause expressly applies even where the only linkage between signatory and nonsignatory entities is common ownership or, as discussed below, where ''management, control, or majority ownership'' of the nonunion entity is by an individual whose relationship to the signatory may be as attenuated as minor shareholder status. In both instances, the clause applies to work of the type performed by the signatory, even though the signatory clearly lacks control over the nonunion entity.

Further, based on a plain reading of the clause, I find no support for the majority's or the judge's inference that the phrase ''exercises directly or indirectly . . . management, control, or majority ownership'' 'presumptively' applies only to situations where the signatory has the power or right to control the assignment of work to the other entity. On the contrary, the clear, disjunctive language of the clause mandates the opposite conclusion.

Finally, when analyzing the Respondent's anti-dual-shop clause, the relevant inquiry is not whether it was proposed to entities that are single employers, but whether it requires a single-employer relationship to be operative. Clearly the instant clause does not.

seek the assignment to unit employees of any work performed by the impacted nonsignatories. Rather, the work is left with the nonsignatory company. The only restriction—which is indeed reflective of intent—is that the contract cover the work performed by the nonsignatory company's employees.

Second, the Respondent's clause likewise applies where ''management, control, or majority ownership'' of the *nonunion entity* is by an officer, director, partner, owner, or stockholder in the signatory company.[11] Thus, the clause prohibits virtually any participation by principals of the signatory in operations of a nonsignatory performing contract-type work, regardless of even a lack of common ownership between the two entities. For example, the clause on its face would apply even where an individual in charge of the nonsignatory's day-to-day operations owns but a single share of the signatory's stock. Clearly, in those circumstances, the signatory would have no right to control the nonsignatory's work.

Contrary to my colleagues, I find that the Respondent's anti-dual-shop clause lacks a valid work preservation object. Instead, it is aimed at satisfying the Respondent's secondary objectives. *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 644–645 (1967).[12]

Under settled Board and court law, the work-preservation defense is restricted to the actual work performed by the signatory employer, and not—more broadly—to the type of work it performs, or to other employees who may perform the same or similar work. *NLRB v. Longshoremen ILA*, supra at 507. Here, however, the clause is not so limited. It expressly applies to legally separate but commonly owned companies even though the signatory has no power to assign the work performed by the nonsignatory.[13] Further, it covers all work in the Respondent's jurisdiction, even if the signatory employers had never performed it. As such, not only is there no actual work preservation, but the clause covers work which is not even ''fairly claimable.'' As stated, rather than prohibiting nonsignatories from performing contract-type work, the clause expressly permits them to do so, but only if they comply with the terms of the agreement.[14]

I do not believe that *Becker Electric Co. v. Electrical Workers IBEW Local 212*, 927 F.2d 895 (6th Cir. 1991), warrants a contrary result. Initially, this case is different from *Becker* where the court found that the clause stemmed from the union's fear that work was slipping away to nonunion ''double-breasts'' and where the clause addressed only ''efforts by the primary employer to avoid the CBA by performing union jobs through other entities it controls.'' 927 F.2d at 899. The court went on to conclude that: ''Because insistence on the clause was a response to this threat, the union had demonstrated that the primary object of the clause was work preservation.'' Id. Here, of course, there is no finding that the Union sought the clause in response to any conduct by Manganaro to avoid its prior collective-bargaining agreements. Indeed, as stated above, the clause here operates without regard to signatory employer conduct and without regard to whether the signatory ''controls'' the other entity.

In any event, the court in *Becker* failed to apply the Board's well-settled ''single employer'' test when evaluating whether the clause had a primary or secondary object. See, e.g., *Schebler Co.*, supra; *Limbach Co.*, supra; and *Hearst Corp.*, supra. Further, in concluding that the challenged clause was protected under the work-preservation defense, the *Becker* court failed to take into account the judicial gloss imposed on *National Woodwork* by *NLRB v. Enterprise Assn. of Pipefitters*,[15] where the Supreme Court expressly approved the Board's right-to-control test. Lastly, the *Becker* court failed to follow established precedent by limiting the scope of valid ''work preservation'' to actual unit

[11] This is the so-called ''upstream'' application of the clause.

[12] I agree with the majority that the Board and courts consider two factors when determining whether a valid work-preservation defense has been made under Sec. 8(e): (1) whether the object of the clause was preservation of work for unit members; and (2) whether the clause requires that the signatory employers have the ''right of control'' of the assignment of the sought work. *NLRB v. Longshoremen ILA*, 447 U.S. 490 (1980); *NLRB v. Enterprise Assn. of Pipefitters*, 429 U.S. 507 (1977). However, unlike my colleagues, I find that the Respondent failed to satisfy either prong of this test. As discussed above, the anti-dual-shop clause does not have as its object preservation of traditional unit work and it encompasses entities over which the signatories lack control.

[13] This distinguishes the instant cases from the *ILA* cases where the signatories controlled the disputed work.

[14] In finding that the clause is not protected by the work-preservation defense, I rely particularly on the literal breadth of the clause. Although, in rejecting the work-preservation defense, I need not additionally rely on the specific facts concerning Manganaro and its nonunion breast, Sweeney, I find that they too support my position. Thus, as found by the judge, there is no evidence that Manganaro's work was diverted to Sweeney, that Sweeney's operations posed a threat to bargaining unit work, or that the parent company ever operated as to favor Manganaro over Sweeney. Indeed, the judge expressly found that Sweeney existed prior to Manganaro, and that the patterns and volume of Manganaro's and Sweeney's work significantly differed. As in *Alessio*, there is no evidence that Manganaro transferred contact-type work to Sweeney, or that it altered its bidding practices to divert work to Sweeney or other nonunion affiliates.

The judge and majority make much of the fact that even though Manganaro's work never declined and, indeed, that the parent company scaled back Sweeney's operations more significantly than it did Manganaro's, the clause had a protected work-preservation object because the union share of the market had declined. I reject this argument. Where, as here, unit work has not been diverted and the signatory's work has not declined, in my view this is not work preservation. Rather, such a clause effectively functions as a union organizing tool.

[15] 429 U.S. 507 (1977).

work;[16] instead, it focused on ''traditional work patterns'' and concluded that the growth of nonunion companies performing traditional unit work triggered the work-preservation defense.[17]

Finally, I find that the anti-dual-shop clause is not protected under the construction industry proviso.[18] The proviso was enacted as an exception to Section 8(e)'s broad prohibition against secondary boycotts. As such, this exception is to be narrowly construed and applied only to that ''pattern of bargaining'' in effect in the industry when the 1959 proviso was enacted. *Alessio*, supra at 1029. This pattern consisted of subcontracting jobsite work. *Electrical Workers IBEW 1186 (Pacific Electrical Contractors Assn.)*, 192 NLRB 254 fn. 1 (1971). But, double-breasting did not exist in 1959. Nor does the legislative history of the 8(e) proviso, as fully explicated in *Alessio*, support the notion that Congress would have chosen to protect this anti-dual-shop stratagem even had it existed. 310 NLRB at 1029.[19] For this reason, and because the proviso is to be strictly construed, it affords no haven for the Respondent's anti-dual-shop clause.

In sum, for the reasons stated by the Board in *Alessio*, I find that the Respondent's clause is secondary, lacks a valid work-preservation object, and is not protected by the construction industry proviso to Section 8(e).

Accordingly, I find that the Respondent violated Section 8(b)(4))(i) and (ii)(A) by refusing to refer employee-members to Manganaro's jobsite in order to compel Manganaro to agree to the anti-dual-shop clause. And, because the clause is prohibited under Section 8(e), I find that the Respondent violated Section 8(b)(3) by insisting to impasse on this nonmandatory bargaining subject,[20] and by refusing to refer employee-members to the Manganaro jobsite in order to compel Manganaro to agree to this proposed clause.

[16] See, e.g., *NLRB v. Longshoremen ILA*, supra at 507; *Longshoremen ILA Local 1291 (Holt Cargo Systems)*, 309 NLRB 1283, 1286 (1992).

[17] See *Becker*, 927 F.2d at 898.

[18] The proviso states that ''nothing in this subsection [8](e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.''

[19] On the contrary, all discussion in the relevant legislative history focused on the then-existing practices of signatories subcontracting work to nonunion entities, or agreements by signatories to refrain from requiring union employees to work along side nonunion employees. Id.

[20] See generally *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Moreover, Sec. 8(b)(3) would be violated even if the clause applied only to companies that are in law single employers if the employers in question were not part of the same collective-bargaining unit. See generally *Peter Kiewit Sons' Co.*, 231 NLRB 76, 77 (1977), enfd. 595 F.2d 844 (1979).

Michael W. Josserand, Esq., for the General Counsel.

David Jonathan Cohen, Esq., of Washington, D.C., for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE PROCEEDING

MARVIN ROTH, Administrative Law Judge. By Decision and Order of August 29, 1990 (299 NLRB 618), the Board remanded this proceeding to me for the purpose of determining whether the proposed antidouble-breasting clause at issue has a secondary objective and thereby falls within the general proscription of Section 8(e) of the Act, or whether the clause constitutes a primary work-preservation clause and therefore would not violate Section 8(e). The Board authorized me to reopen the hearing for this purpose. The Board reconsidered and vacated its orders of April 14 and July 16, 1986, which in effect precluded Respondent Union from adducing evidence on the issue in connection with the operations of then Charging Party A. C. & S., Inc. and related or allegedly related firms. The Board passed on only one substantive issue. The Board reversed my finding that Charging Parties Manganaro Maryland[1] and A. C. & S. were part of the multiemployer bargaining unit of painting and drywall finishing contractors in the Washington, D.C. area. The Board stated that it considered this matter ''in order to define further the issues on remand.'' On the Union's motion for reconsideration, the Board in an unreported Decision and Order dated May 9, 1991, held in sum that I was not precluded from again considering the unit question in light of evidence previously excluded by the Board's 1986 orders.

As the Board indicated in its reported Decision and Order (fn. 3), there were originally four Charging Parties in this case. By the close of the hearing on June 12, 1986, there were only two: Manganaro Maryland and A. C. & S (Maryland Drywall and John H. Hampshire, Inc. reached settlements with the Union, withdrew their charges, and pertinent complaint allegations were accordingly dismissed). Following the Board's May 9, 1991 Decision and Order, A. C. & S, petitioned for permission to withdraw its charges. I granted the petition, for reasons set forth in my ruling and Order of August 15, 1991. In the meantime, Manganaro Maryland, which actively participated in the 1985–1986 hearing and subsequent litigation before the Board, indicated that it did not wish to participate in the remanded proceeding. However, Manganaro Maryland did not at this time ask to withdraw its charges, and they remain pending. The General Counsel and the Union, i.e., the only parties now participating in the proceeding, stipulated in sum that for the purposes of this remand, and without waiving the Union's right to file exceptions with the Board: (1) all subpoenaed persons are released, and there shall be no hearing at this time; (2) the bargaining unit for consideration of the work-preservation object is that of Manganaro Maryland employees (but without waiving the Union's argument that Manganaro Maryland and Sweeney were alter egos and/or a single employer with a shared appropriate bargaining unit); and (3) on these assumptions and the existing record, the parties will brief to me whether the Union's effort in 1983 and 1984 to obtain the

[1] The caption has been amended to reflect deletion of Cases 5–CC–1038 and 5–CB–4689 in which A. C. & S., Inc. was the Charging Party.

preservation of work clause from Manganaro was a lawful primary effort to preserve bargaining unit work. The parties further stipulated as follows:

> When the events at issue in this case took place, and until June 1, 1987, Manganaro Holding Company, Inc. (''Holding'') owned 100 percent of Sweeney Company of Maryland (''Sweeney'') and Sweeney Corporation Maryland (''Corporation''). Effective June 1, 1987, Corporation bought Sweeney, and Holding sold Corporation in its entirety to Lloyd T. Carhart and Charles E. Wachter. Holding has no further ownership interest, legal or equitable, in Sweeney or Corporation. Since these sales, Manganaro Corporation, Maryland and Sweeney have been operated separately, and the only Manganaro corporation, company or other legal entity operating in the geographic jurisdiction of District Council 51 has been Manganaro Corporation, Maryland.

I approved the stipulations and fixed a briefing schedule. Unlike the A. C. & S. situation, the record was fully and fairly developed concerning the operations of Manganaro Maryland and Sweeney. The complaint alleged secondary boycott violations insofar as the Union's conduct was directed at Manganaro. Therefore, under the rationale of the Board's July 16, 1986 order, evidence concerning the operations and relationships of the various Manganaro organization companies, including Manganaro and Sweeney, would be admissible in evidence. I recommended dismissal of the secondary boycott allegations because (1) the evidence failed to indicate that the Union struck Manganaro Maryland for any object other than to obtain a contract containing the clause at issue and (2) the Manganaro organization companies, including Manganaro Maryland and Sweeney, constituted a single employer under the Act. Therefore the rationale of the Board's order precluded me from considering such evidence on the 8(b)(4)(A) allegations or, at least, left me in the dark as to what evidence I could consider without acting in disregard of a Board order. The Board has now released me from that constraint. The parties also adduced evidence concerning industry area patterns, practices, negotiations, and other factors which could or would be relevant to the work preservation issue. The Union was precluded only from adducing testimony through its subpoenas directed at obtaining documents of A. C. & S. and related or allegedly related companies, and testimony by CIB Operations Manager Russell Seifert. The Union has now waived production of such evidence for purposes of this remand proceeding. I am satisfied that the record is now adequate for the purpose of resolving the issue posed by the Board as stipulated by the General Counsel and the Union.

On the entire record in this case, including my initial decision and the Decision and Orders of the Board,[2] and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel, the briefs previously submitted by the parties, and the supplemental and supplemental reply briefs submitted by the General Counsel and the Union, I make the following

[2] Certain errors in my initial decision are noted and corrected.

Supplemental Findings of Fact and Conclusions of Law

Practically the Manganaro case (the only remaining case in this proceeding) could be regarded as moot. The double-breasted operation of Manganaro Maryland and Sweeney has not existed since June 1, 1987. Manganaro Maryland, the union wing, is the only Manganaro entity operating within the Union's geographic jurisdiction. The evidence adduced in the 1985–1986 hearing does not reflect the Manganaro organization's current operations within that jurisdiction. However, so far as indicated by the present record, the Union never voluntarily abandoned its strike or demand that Manganaro Maryland sign a contract containing the clause at issue. The Union remains subject to a 10(l) injunction. Moreover, the parties make clear that they want a Board determination of the issues presented in the Manganaro case, even if that determination must be made on the basis of facts which are no longer operative. No party contends that the case is moot. Therefore, I approved the stipulation of the General Counsel and the Union, and I shall proceed to the merits in accordance with the Board's remand and the parties' stipulation. In my initial decision I recommended dismissal of the entire complaint. I specifically recommended dismissal of the 8(b)(4)(A) and (3) allegations because the clause at issue is protected by the construction industry proviso to Section 8(e). I do not intend to reconsider that determination. As indicated, the Board held that Manganaro was not part of the multiemployer unit. The Union waived presentation of further evidence on the matter, and the Board's determination is binding upon me. I am proceeding on the premise that the bargaining unit for consideration of the issues on remand is either the employees of Manganaro Maryland or a unit of Manganaro and Sweeney employees. Although the Board vacated its orders which precluded the Union from adducing evidence concerning A. C. & S-CIB's operations, the Board gave no explanation beyond stating that the documents and the testimony sought were necessary to resolve the work preservation issue. Although the Board stated that it considered the unit question in order to further define the issues on remand, the Board did not state that evidence on the work-preservation issue must be strictly compartmentalized by unit. In sum, the Board has not passed on the General Counsel's theory of a violation or the propriety of the Union's defense. In these circumstances, I shall deal with the issue on remand by a series of alternative or hypothetical considerations.

In *General Teamsters Local 982 (J. K. Barker Trucking Co.)*, 181 NLRB 515, 517 (1970), affd. 450 F.2d 1322 (D.C. Cir. 1971); and *Operating Engineers Local 701 (Lease Co.)*, 276 NLRB 597, 600 (1985), the Board defined its analysis of agreements alleged to violate Section 8(e):

> If the meaning of the clause is clear, the Board will determine forthwith its validity under 8(e); and where the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law. On the other hand, if the clause is ambiguous, the Board will not presume unlawfulness, but will consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner. In the absence of such evidence, the Board will refuse to pass on the validity of the clause.

Therefore the first question presented is whether the clause at issue is clearly unlawful on its face (as contended by the General Counsel), or lawful on its face (as contended by the Union). If either view is correct, then no further evidence need be considered. In my initial decision, I held that the General Counsel made out a prima facie case that the Union violated Section 8(b)(4)(A) because: (1) the Union's refusal to refer employees constituted the kind of coercive conduct proscribed in Section 8(b)(4); (2) ''theoretically at least,'' the clause at issue could govern the relationships among entities which are separate employers or persons under the Act; and (3) such ''application of the contract'' clauses, on their face, meet the ''cease doing business,'' language of Section 8(e). However, I did not address the question of whether the clause at issue *in fact* fell within the proscription of Section 8(c), including but not limited to consideration of the Union's work-preservation defense. I now address that question. For the reasons which I now discuss, I find and conclude that the clause at issue does not fall within the proscription of Section 8(e).

With respect to Manganaro Maryland, the complaint alleges in two ways that the clause at issue was unlawful. Paragraph 24 alleges that the clause unlawfully requires Manganaro Maryland to cease doing business with Brothers, Industries, and Holding unless the contract sought by the Union was applied to Sweeney. Paragraph 23 alleges that the clause would unlawfully require Manganaro Maryland ''to refuse to engage in business with any separate person unless the agreement is applied to that person.'' By this dichotomy, the General Counsel evidently sought a determination concerning the status of the various Manganaro organization companies. I made such determination in connection with the 8(b)(4)(B) allegation. I found that Manganaro Maryland, Brothers, Industries, Holding, and Sweeney together constituted a single employer under the Act. I specifically found that all of the critical elements (common ownership, centralized control of labor relations, common management, and interrelation of operations) were present. The Manganaro companies together constituted a single employer and a single person within the meaning of Section 8(e). Therefore there could be no violation of Section 8(b)(4)(A) as alleged in paragraph 27, and I am recommending that this allegation of the complaint be dismissed.

Paragraph 23 is couched in broader terms. The allegation is not limited to the Manganaro entities as of 1984. Rather, paragraph 23 alleges in essence that the clause would unlawfully restrict Manganaro Maryland in or from doing business with other entities in the future. In determining the legality of the clause, the law as developed under both Section 8(b)(4)(B), the secondary boycott provision, and Section 8(e), the hot cargo provision, are applicable. Section 8(e), in effect prohibits agreements to engage in secondary boycotts. As the Supreme Court pointed out in *National Woodwork Mfgs. Assn.*, 386 U.S. 612, 635 (1967), Section 8(e) is a ''loophole closing measure'' which ''closely tracks'' the language of Section 8(b)(4)(B). Just as Section 8(b)(4)(B) does ''not reach employees' activity to pressure their employer to preserve for themselves work traditionally done by them,'' Section 8(e) does not prohibit agreements made and maintained for that purpose. Bearing this in mind, we examine the language of the clause at issue; specifically, section 1, the substantive provision of the clause. First, the clause purports to have a lawful purpose, namely: ''To protect and preserve, for the employees covered by this Agreement (i.e., unit employees) all work that they have performed, and all work covered by this agreement (i.e., unit work), and to prevent any device or subterfuge to avoid the protection and preservation of such work.'' *National Woodwork*, 386 U.S. at 635. Section 2 of the 1981–1984 Area Agreement states that: ''The Contractor recognizes the Union for all of the Contractor's journeymen and apprentices, including temporary employees, employed in connection with commercial painting and drywall finishing contracts as hereinafter defined in the Washington, D.C. Metropolitan Area.'' Second, the clause applies only to unit type work, i.e., commercial painting and drywall finishing work in the Washington, D.C. metropolitan area. Third, the clause applies to such work only when performed *by the signatory employer* through a business entity which is under ''management, control, or majority ownership'' of the signatory employer. The clause is not triggered merely by the fact of an affiliation, subsidiary to parent relationship or ''ownership interests'' which fall short of majority ownership.[3] Fourth, the only effect of such work performance is that the terms and conditions of the contract will be applied to *that work*. In sum, the clause does not apply to terms and conditions of employment for anything other than the performance of unit type work.

As indicated, the clause addresses a situation where the *signatory employer*, through the device of another entity, is performing unit type work under nonunion conditions. In such situation, the Union would have a primary dispute with the signatory employer. Under *J. K. Barker*, supra, the Board will interpret such clause ''to require no more than what is allowed by law.'' Moreover, if an employer ''exercises directly or indirectly . . . management, control or majority ownership'' over another entity, then the employer presumptively has the right or power to control assignment of work by that entity. See my discussion at JD 23–25 and cases cited there.[4] Where as here, a union engages in strike conduct against an employer having right or power to control assignment of work, concerning the terms and conditions of employment under which such work is performed, and such work would constitute unit or fairly claimable unit work if performed directly by that employer, then the union is not engaged in a secondary boycott or a demand for an unlawful hot cargo agreement, i.e., an agreement to engage in a secondary boycott. See *Becker Electric Co. v. Electrical Workers IBEW Local 212*, 927 F.2d 895 (6th Cir. 1991), *Berman Enterprises v. Longshoremen ILA Local 333*, 644 F.2d 930 (2d Cir. 1981), cert. denied 454 U.S. 965 (1981).[5] See also

[3] Compare, the ''Integrity Clause'' in *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB 766 (1989), enfd. in part and remanded 905 F.2d 417 (D.C. Cir. 1990).

[4] As indicated in my decision, the principal author of the clause at issue testified that it was intended that the clause at issue should apply only when the entities involved met the *Kiewit* test for a single employer. However, the language of the clause is not so limited. I interpret the clause to mean what it says.

[5] The General Counsel suggests (Supp. Br. 16), that *Becker* should be disregarded, because it was not fully or adequately argued. Noting that plaintiffs therein were represented by a former Board Regional attorney, I find the suggestion unpersuasive. The General Counsel makes a similar argument with reference to Administrative Law Judge Ladwig's Decision in *Carpenters District Council of*

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the cases cited in my initial decision at JD 25 (*Teamsters v. Oliver, A.C.E. Transportation, Terminal Barber Shops & Checker Taxi Co.*). And see also the Board's Decision on remand in *Checker Taxi*, 283 NLRB 340 (1987); *Teamsters Local 70 (Chipman Freight)*, 283 NLRB 343 (1987), affd. 843 F.2d 1224 (9th Cir. 1988); and *Teamsters Local 560 (Curtin Matheson Scientific)*, 248 NLRB 1212 (1980). Significantly, some of these cases did not even involve firms with shared common ownership. Rather they involved leasing or contracting arrangements between separately owned entities. In *Chipman Freight*, the Board emphasized that Section 8(b)(4) prohibits strike conduct only against ''neutral parties, those 'wholly unconcerned in the disagreement.''' In the present case, an entity under the management control or majority ownership of Manganaro Maryland, performing unit type work, ''cannot be regarded as a neutral and wholly unconcerned party in a dispute over the alleged loss of unit work.''

The General Counsel's reliance on *Schebler Co.*, supra (Supp. Br. 11–12), falls wide of the mark. The ''integrity clause'' at issue in that case was far broader than the present clause in several respects. First, the integrity clause applied to firms having either a subsidiary or parent relationship with the signatory employer, and extended to entities in which the signatory had ''ownership interests'' which might be less than majority or even controlling interest (if the stock were not publicly traded). Most important, the clause was not limited to the performance of unit type work. Rather, the clause embraced any work covered by Sheet Metal Workers' Union contracts anywhere in the United States. (*Sheet Metal Workers Local 80 (Limbach Co.)*, 305 NLRB 312 (1991); and *Limbach Co. v. Sheet Metal Workers*, 949 F.2d 1241 (3d Cir. 1991), are similarly distinguishable from the present case.) Indeed the respondent in *Schebler*, a local representing employees in the Rock Island, Illinois area, did not raise a work-preservation defense, and invoked the clause in connection with work performed by a nonsignatory company in Phoenix, Arizona. (The respondent union also did not rely on the construction industry proviso to Sec. 8(e), and the Board found that the clause was not limited to onsite construction work.) Nevertheless, the court of appeals left open the possibility that the clause might be lawful if a provision for penalty of contract recision were deleted. The General Counsel's reliance on *Hearst Corp.* and its progeny (Br. 34) is also misplaced.[6] In four of these cases, a union which represented the employees of an autonomous division of a parent corporation, picketed that division in furtherance of a labor dispute involving another autonomous division located in a different and distant city or engaged in a different type of business. In the fifth case (*Baxter Construction*), a union which represented employees of an autonomous subsidiary corporation in the construction industry picketed that corporation in furtherance of a dispute involving another subsidiary corporation engaged in a different type of construction work. The Board held in each case that the divisions and subsidiaries each constituted separate employers and persons within the meaning of Section 8(b)(4)(B). In none of the cases did the picketing union's unit claim, or have an arguable claim to the work performed by the boycotted division or subsidiary. Moreover, the continuing viability of the *Hearst Corp.* rationale and line of cases is questionable in light of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). In that case the Supreme Court held that a parent corporation and its subsidiary were legally incapable of conspiring with each other within the meaning of section 1 of the Sherman Antitrust Act (15 U.S.C. 1). The Court reasoned that: ''In reality a parent and a wholly owned subsidiary always have a 'unity of purpose or a common design.' They share a common purpose whether or not the parent keeps a tight reign over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests'' (467 U.S. at 771–772). Therefore, the Court concluded that the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for the purposes of section 1 of the Sherman Act. The Supreme Court's rationale is equally applicable in the field of labor relations, to the operations of a parent corporation and its operating divisions or wholly owned subsidiaries.

If the Board should disagree, and conclude that the clause at issue is clearly unlawful on its face, then no further consideration of the evidence would be necessary. However the Board might conclude that the clause is ambiguous. Anticipating that possibility, I must further consider the evidence in order to determine its legality. I shall first focus on the relationship between Manganaro Maryland and Sweeney; and then address that relationship as viewed from the perspective of a multiemployer unit. For the reasons which will be discussed, I find that: (1) Sweeney was not the alter ego of Manganaro Maryland; (2) applying the standards of *Peter Kiewit Sons' Co.*, 231 NLRB 76 (1977), the employees of Manganaro Maryland and Sweeney did not constitute a single bargaining unit; (3) viewed objectively, the evidence fails to demonstrate that Sweeney's operations posed a threat to preservation of bargaining unit work; and (4) viewed from the standpoint of the Union's intent and objective evidence concerning the multiemployer unit as defined in *Apex Decorating Co.*, 275 NLRB 1459 (1985), the Union's motive in seeking the clause at issue was preservation of unit work, and the Union had reason to believe that double-breasted operations by signatory employers caused or threatened loss of unit work.

The alter ego doctrine is an extension of the concept of a single employer. The criteria used in determining ''whether two facially independent employers constitute alter egos'' under the Act, are similar to those used in determining single employer status. ''Although each case must turn on its own facts,'' the Board generally finds alter ego status ''where the two enterprises have substantially identical [ownership], management, business purpose, operation, equipment, customers and supervision.'' *Advance Electric*, 268 NLRB 1001, 1002 (1984). In *Advance Electric*, the Board held that in determining whether an alter ego status was present, it would consider ''whether the purpose behind the creation of the alleged

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Northeast Ohio (Alessio Construction Co.), in which counsel for the General Counsel was the same as originally in the present case.

[6] *Los Angeles Newspaper Guild Local 69 (Hearst Corp.)*, 185 NLRB 303 (1970), enfd. 443 F.2d 1173 (9th Cir. 1971), cert. denied 404 U.S. 1018 (1972). See also *Television Artists AFTRA (Hearst Corp.)*, 185 NLRB 593 (1970), enfd. 462 F.2d 887 (D.C. Cir. 1972); *Teamsters Local 391 (Vulcan Materials Co.)*, 208 NLRB 540 (1974); *Commercial Workers Local 1439 (Price Enterprises)*, 271 NLRB 754 (1984); and *Carpenters District Council of Houston (Baxter Construction Co.)*, 201 NLRB 23 (1973).

alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act,'' but that such intent is not an essential element of an alter ego relationship. See also *Fugazy Continental Corp*., 265 NLRB 1301, 1302 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1983); *Goodman Piping Products v. NLRB*, 741 F.2d 10, 12 (2d Cir. 1984). Contra: *Alkire v. NLRB*, 716 F.2d 1014, 1020 (4th Cir. 1983). However, there are critical differences both in the definition of the alter ego concept and its consequences. Two nominally separate business entities may be regarded as a single employer if one is the alter ego or ''disguised continuance'' of the other. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). ''Technically, 'alter ego' refers to a situation in which the original employer has transferred its work to a second employer, the alter ego, and has gone out of business. 'Single employer' and 'joint employer' apply to two companies operating in a unified fashion.'' (Citations omitted.) *Rebel Coal Co*., 279 NLRB 141, 143 (1986) . Alter ego cases ''involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor.'' *Howard Johnson Co. v. Hotel Employees Union*, 417 U.S. 249, 259 fn. 5 (1974). A double-breasted operation is not per se an alter ego relationship. A collective-bargaining contract signed by one of the companies would not bind the other if each were a separate corporation, but would bind the other if both constituted a single employer *and the employees of both companies constituted a single appropriate bargaining unit or the nonsignatory company is an alter ego of the signatory company*. [Emphasis added.] *Walter N. Yoder & Sons*, 270 NLRB 652 fn. 2 (1984).

Sweeney was not the alter ego of Manganaro Maryland because Sweeney was not the ''disguised continuance'' of Manganaro Maryland. Sweeney was formed and commenced operations before Manganaro Maryland. The Manganaro organization commenced nonunion operations in the Washington, D.C. metropolitan area in 1979, initially through Sweeney Corporation, Maryland, which was phased out and replaced in 1982 by Sweeney Company. In 1980 the organization commenced union operations through Manganaro Maryland. Thereafter both operations grew and prospered, side by side. The Manganaro organization never sought to conceal the fact that it was engaged in double-breasted operations. By 1982 the Union was well aware of the growth of double-breasted operations in the construction industry, both at the general contractor level and among painting and drywall contractors. The Union sought to address this situation in the 1981–1984 area contract, with its ''reason to believe'' clause. That clause provided in sum that the Union reserved the right not to enter into or remain in any contract with an employer if the Union had ''reason to believe that [such] employer is operating on a dual shop or double-breasted basis, which would be a serious breach of our existing agreement and an unfair Labor Practice under Taft-Hartley.'' Most significantly, the Manganaro organization never operated in a manner to favor Sweeney over Manganaro Maryland, or to siphon off work from Manganaro Maryland to Sweeney. Rather the Manganaro organization operated both companies under one guiding principle namely, to make use of the double-breasted operation to obtain the maximum amount of work for the organization. In 1983–1984 John Manganaro modified this principle, for reasons unrelated to the present case, by scaling down the operations of both companies. Manganaro believed that both companies were in a rapid growth pattern which would prevent them from achieving their projected goals. He reduced the operations of Sweeney to a greater extent than those of Manganaro Maryland. The evidence fails to indicate that the organization ever bid for a job through Sweeney rather than Manganaro Maryland in order to avoid contractual terms and conditions of employment. Rather the determination was based on which company was more likely to get the work. If Manganaro Maryland was more likely, or Sweeney was precluded, e.g., because the general contractor was union and signatory to a contract with a subcontracting clause, then Manganaro would bid. If Sweeney by reason of its nonunion status was more likely to get the work, then Sweeney would bid. The decision to award the drywall contract rested with the general contractor or construction manager. Gilbane Building Company was construction manager for a project at 1023 15th Street. When it appeared that the project would be union, Manganaro Maryland submitted a bid. Sweeney was not invited to bid. However when it appeared that the project was going nonunion, Manganaro Maryland withdrew its bid and Sweeney submitted a bid. Similarly John Hampshire, Inc., a union signatory, deferred to HIVA Springfield, its nonunion affiliate, which obtained the drywall contract. The decision to go nonunion was that of the owner and/or Gilbane, and not the drywall contractors. Conversely, when general contractor George Hyman Company, the union wing of Clark Industries, replaced Omni Construction Company, the nonunion wing, as general contractor on the Washington Harbor job, Omni voided Sweeney's bid and Hyman invited Manganaro Maryland to submit a bid. Such situations were unusual. Generally the drywall contractors knew before hand whether the job would likely go to a union or nonunion contractor, and bid or refrained from bidding accordingly. Usually the general contractor invited only one or the other to bid. Manganaro Maryland never subcontracted work to Sweeney. However, Sweeney sometimes subcontracted portions of its work to Manganaro Maryland or other union drywall contractors. Sweeney subcontracted portions of its work on the BNA, B & O, Howard University, and Summer School projects to Manganaro Maryland. The reason for such subcontracting was that Manganaro Maryland's employees were generally more skilled than those of Sweeney, and the work in question was difficult work which Sweeney's employees were not qualified to perform. In sum, the evidence indicates that the Manganaro organization regarded Manganaro Maryland as its flagship Company in the Washington metropolitan area, and had no intention of using Sweeney as a means of displacing Manganaro Maryland.

I further find that measured by *Kiewit* standards (see my initial decision) the employees of Manganaro Maryland and Sweeney did not constitute a single bargaining unit by operation of law. From the beginning Manganaro Maryland operated as a union firm, subject to contractual terms and conditions of employment, and Sweeney operated as a nonunion firm. As found, there was no effort to siphon off work from one to the other. Although bidding activity was coordinated

and controlled by Manganaro organization management, each company bid separately for jobs. Determination of which company would submit a bid was not based on mutual scheduling of work or other effort to coordinate their operations. Each company worked separately from the other on its own jobsites. On those few occasions when Manganaro Maryland performed subcontracted work for Sweeney, there was no greater jobsite coordination between them than there would be between independent contractors at the site. There was no common supervision on the job, or interchange of equipment or raw materials. There was interchange of personnel and functions among management personnel, specialists such as engineers and estimators, and clericals. But there was no interchange among first line foremen or among tapers or finishers i.e., unit or unit-type personnel. It is undisputed that an audit of Manganaro organization records, taken by the union trust funds, and covering a 5-year period from June 1, 1979, through May 30, 1984, disclosed that a total of 128 unit employees worked for Manganaro Maryland, of whom 44 also worked for Sweeney at one time or another, under nonunion conditions. However the Union failed to present evidence that Manganaro Maryland *transferred* any first line supervisor or unit type employee to Sweeney, or that Sweeney transferred such personnel to Manganaro Maryland. Richard Trembley was Manganaro Maryland's field manager from February 1981 until April 1985. Trembley testified in sum that he was in charge of hiring field employees, that it was company policy not to switch union and nonunion personnel, that he informed his foremen of this policy, and that he never directed any Manganaro Maryland taping or finishing employee to go to Sweeney or any other employer or instruct his foremen to do so. Trembley further testified that drywall employees frequently switched from job to job or from employer to employer (as is common in the construction industry), and that union employees frequently worked on nonunion jobs, particularly on weekends. Although the Union, through the trust funds audit, knew the names of every Manganaro unit employee who also worked at Sweeney, the Union failed to produce a single one of them in order to show that any had been transferred from one company to another. Union Secretary-Treasurer Daniel Ager testified that Manganaro Maryland sometimes tried to use nonunion help on jobsites, although the Union did not know where they came from. However, the Union successfully maintained its policy that all employees must be referred through its hiring hall and be or become union members. As found in my initial decision, the wages, benefits and working conditions of Manganaro Maryland's field employees were governed by applicable collective-bargaining contracts; whereas personnel decisions (hiring, firing, transferring, etc.) and wages and working conditions for Sweeney field personnel were determined at the company level by Sweeney's president or his subordinates. Sweeney's field employees were covered by a health insurance plan which was their only fringe benefit. In sum, as I found in my initial decision, John Manganaro established guidelines, based on the *Kiewit II* ''road map,'' in order to assure that the Manganaro Organization could conduct a lawful double-breasted operation. However, I do not agree with the General Counsel's argument that the Union acquiesced in the existence of separate units. The Union viewed double-breasting as a multiemployer problem. In 1981, shortly after Manganaro commenced operations, the Union negotiated a 3-year contract containing the ''reason to believe'' clause which was designed to eliminate double-breasting. The Union vigorously sought to enforce the clause against painting and drywall contractors whom it believed were engaged in double-breasted operations. The Union pursued its goal through negotiation and demands, refusal to sign contracts with noncomplying employees, court litigation, unfair practice charges (*Apex Decorating*) and grievance proceedings. The Union presented noncomplying employers with the alternatives of going totally nonunion, showing divestiture, negotiating a contract with the nonunion firm, or proving no connection with that firm. In the case of Manganaro Maryland/Sweeney, the Union trust funds demanded contributions into the funds from Sweeney on the basis of hours worked as disclosed by their audit. The claim was settled. However, as the 1984 negotiations approached, the Union decided to abandon the ''reason to believe'' clause, because the Board's Regional Office administratively advised the Union that the clause was unlawful by reason of its self-help provision. Instead the Union proposed the clause at issue. Moreover, *Kiewit II* precluded the Union from asserting that Sweeney's employees were covered by reason of Section 8(a)(5), part of the bargaining unit, unless the Union could demonstrate an alter ego relationship (as in *Apex Decorating*), or failure to meet *Kiewit II* standards for double-breasting. In these circumstances, the Union cannot be said to have acquiesced in existence of separate union and nonunion units.

I further find that from an objective standpoint, the evidence fails to demonstrate that Sweeney's operations posed a threat to preservation of ''bargaining unit work,'' meaning the work of Manganaro Maryland's employees performing drywall work. The pattern and volume of work of Manganaro Maryland differed significantly from that prevailing among union painting and drywall contractors in the Washington area during the years 1980 through 1984. First, as indicated, Manganaro Maryland was new to the area, having commenced operations in 1980, about 1 year after Sweeney. Therefore, viewing Manganaro Maryland as a unit, there was no prior basis, when comparing its operations with those of Sweeney, for determining what constituted unit work. During the years 1980 through 1983, Manganaro Maryland, like Sweeney, enjoyed phenomenal growth. Total reported hours worked by Manganaro Maryland unit employees rose from about 976 in 1980 to 16,744 in 1982 and 36,054 in 1983. Sales volume climbed steadily, outstripping Sweeney, as the following comparative figures (in millions of dollars) indicate:

	1978–89	*1979–80*	*1980–81*	*1981–82*	*1982-83*
Sweeney	.300	1,596	2,919	1,359	4,159

	1978–89	*1979–80*	*1980–81*	*1981–82*	*1982-83*
Manganaro Maryland	0	1,757	4,800	7,615	12,331

Union secretary-treasurer, Ager, testified that to his knowledge Manganaro Maryland consistently increased the number of its union tapers as its operations grew, through the period 1981 to 1984 and until the strike which began in May 1984. Both the number of hours worked and sales volume dropped in 1984. However, this was attributable to two factors unrelated to the work-preservation issue: (1) John Manganaro's decision to scale back operations in the Washington area, which impacted Sweeney more than Manganaro Maryland; and (2) the Union's strike. Moreover, as previously discussed, the Manganaro organization never conducted its operations in the Washington area in such a manner as to indicate an intent to divert work from Manganaro Maryland to Sweeney.

In making these findings, I have not at this point taken into consideration the Union's subjective intent in seeking the clause at issue. *National Woodwork* frames the work-preservation issue in terms of ''the Union's objective,'' i.e., the Union's motivation or subjective intent. The Union's intent can be gleaned from the facts, but the intent is the bottom line issue. In the present case, the Union's motivation vis-a-vis Manganaro Maryland cannot be separated from its motivation in seeking the clause from all union painting and drywall contractors. The Union did not have one reason for wanting Manganaro Maryland to sign a contract with the clause, and a different reason or reasons when dealing with other union contractors. Therefore, I shall address the Union's motivation in connection with the next issue, namely, the question of work preservation in context of the multi-employer unit.

Also, in considering the work-preservation issue in the context of Manganaro organization operations, I do not agree with the General Counsel's contention and John Manganaro's assertion that Manganaro Maryland and Sweeney operated in different markets. As will be further discussed in connection with the next issue, there was until the mid-1970's a fairly clear delineation between a union market and a nonunion market in the Washington area. However, for reasons which will be discussed, that line became increasingly blurred during the years 1975 to 1984. We have already seen how bidding shifted between Manganaro Maryland and Sweeney when jobs went from union to nonunion. The principal factor which determined whether Manganaro Maryland or Sweeney would bid for or obtain a job, was whether the drywall job would be union or nonunion. To a lesser extent, involving particular kinds of work, the determination turned on whether Sweeney's employees lacked the requisite skills to perform the work. The jobs bid or performed by Manganaro Maryland and Sweeney, differed in degree but not in kind. During the years 1983 to 1985, 76 percent of the total job value of Manganaro Maryland's work was in the city of Washington. For Sweeney the figure was 20 percent. The average value of a Manganaro Maryland job was $1,439,000. For Sweeney the figure was $899,000. Manganaro organization comptroller Thomas Vagrin testified in sum that Manganaro Maryland mainly bid and negotiated ''large, monumental projects,'' averaging $1,500,000 to $2 million in value. Manganaro Maryland operations manager Russell Emerson testified in sum that his firm was competitive with nonunion firms in specialty, i.e., complicated work, including hospitals and newsrooms. Manganaro Maryland Vice President for Sales Richard Jackson coordinated bidding for that firm and Sweeney. Jackson testified in sum that Sweeney bid and performed historically nonunion work, meaning work beyond the Capitol Beltway, walkup apartments, Beltway-type office buildings, and hotels around the Beltway. He testified that 95 percent of jobs in Virginia were open shop, and that Manganaro Maryland would not bid to an open shop contractor. However, Jackson conceded that there were no fixed rules concerning these distinctions. Jackson testified that he did not know in advance whether certain major contractors such as Turner, Gilbane, and Bechtel were operating union or nonunion on a particular job, or whether they were functioning as general contractors or construction managers (in the latter case, even a union contractor would not be bound by a union subcontracting clause). Emerson's counterpart, Sweeney President Lloyd Carhart, testified that Sweeney did not bid on monumental or complicated ornate type work because it lacked an appropriate work force or management capability. Rather, Sweeney performed basic repetitive work like apartments and hotels, preferably with employees paid on a piecework basis. (Sweeney paid its employees both on hourly and piecework bases.) John Manganaro testified that Manganaro Maryland and Sweeney operated in different markets, because Sweeney basically built townhouses. However these alleged distinctions did not prevent Sweeney from stating, by letter dated November 5, 1984, that it was interested in large projects, meaning drywall contracts over $2 million, ''in areas outside our primary market interest.'' Nor did they preclude Sweeney from bidding and performing the East Capitol job (value $4,500,000) or the Lakeside Plaza job (value $2,183,000). Nor did the distinctions preclude Sweeney from bidding or obtaining contracts for major downtown Washington projects such as 1023 15th Street, 1250 I Street, 1300 New York Avenue, Square 290, 1111 14th Street, or the BNA building. Nor did Manganaro Maryland's professed superiority in performing hospital work, preclude Sweeney from bidding and obtaining the National Rehabilitation Hospital and MCV North Hospital jobs. Nor did Manganaro Maryland's superiority in newsroom work, prevent the NBC, WETA, and ACCO (TV) jobs from going to nonunion drywall contractors. Nor did historical nonunion work, as defined above, prevent Manganaro Maryland or other union contractors from bidding and obtaining the Montgomery Mall, Corcoran Townhouses, McLean Hilton, and Melpar (Northern Virginia) office building jobs, although all fell within the definition of that work. Manganaro Maryland bid the White Flint Mall North job (typical nonunion) although the project eventually went nonunion. Manganaro Maryland obtained the Fair Oaks Hospital job, through bidding against nonunion drywall contractors. In sum,

Manganaro Corporation and Sweeney operated in the same market.

This brings me to the work-preservation issue as considered in the context of the multiemployer unit. As indicated, until the mid-1970s there was a fairly clear line between a union and nonunion market in the Washington area. Two decisions in labor law spawned a breakdown of this pattern. Prior to the Board's decision in *Kiewit II* (1977), double-breasted operations, ''In which a contractor operates two companies, one unionized and the other nonunionized,''[7] were largely unknown in the Washington area. Within 3 years, double-breasting became the prevailing pattern in the construction industry. By the early 1980's most large union general contractors had nonunion affiliates, and most major drywall contractors also conducted double-breasted operations. In the words of CIB operations manager, Russell Seifert (reporting on the 1984 contract negotiations) ''all [drywall] union competitors have nonunion outlet.'' Two years before *Kiewit II*, the Supreme Court issued its Decision in *Connell Construction Co. v. Plumbers Local 100* (discussed in my initial decision). The court held in sum, that the construction industry proviso to Section 8(e) did not protect agreements outside the context of collective-bargaining relationships. This decision led to the use by owners and developers of ''construction managers'' who were responsible for awarding subcontracts. Union general contractors increasingly functioned as construction managers, i.e., outside the context of a collective-bargaining relationship. Freed from the constraints of union subcontracting agreements, the general contractor, in the role of construction manager, could and did award jobs to union or nonunion subcontractors as they saw fit. Additionally, in connection with a few projects, owners or developers invited ''Split list'' bidding. Union and nonunion general contractors could bid, union subcontractors would submit their bids to the union general contractor and nonunion subcontractors to the nonunion general contractor, and the owner or developer's selection of a general contractor determined whether the project would be union or nonunion. As a result of these developments, the former distinction between union and nonunion markets became, in the words of Richard Jackson, ''blurred'' or ''confusing.''

The breakdown in the distinction between the former union and nonunion markets worked to the detriment of union painting and drywall employees, i.e., those employees in the multiemployer bargaining unit or employed by other signatories to the union area contract. Union painting and drywall contractors could not compete pricewise with nonunion contractors. This was a labor intensive business in which labor costs were significantly less for nonunion firms. Manganaro Maryland operations manager, Emerson, testified that on nonspecialty work, his firm's bid usually was nearly 20 percent higher than that of nonunion firms bidding for the same job. Moreover, double-breasting tended to undermine the validity of conventional bargaining over wages and working conditions. Contractors engaged in double-breasted operations (including most major signatory drywall contractors), knowing they could get work through one wing or another except on all union projects, showed little inclination to press for contract concessions. Thus, Manganaro Maryland did not seek concessions from the Union in order to reduce its bid on the 1023 15th Street job, but instead, substituted Sweeney as bidder. In response to an inquiry from Gilbane Building Company concerning possible implementation of market recovery wage rates, Comptroller Vagrin responded: ''It is the policy of Manganaro Maryland to pay full wage scale on all our projects, as this is the best way to attract and retain quality tradesmen. Therefore, all our invoices for extra work outside our contract requirements will reflect those wage scale amounts.'' Vagrin did not claim that the Union insisted on full wage rates. As a result of these developments, the volume of union drywall work remained relatively constant during a period of time (late 1970's and early 1980's) when there was a construction boom in the Washington area, including drywall work. The union trust funds audit disclosed, for the years 1980 through 1983, a pattern of consolidation and stagnation among union drywall contractors, with the conspicuous exception of Manganaro. Three union firms (Vintage, Magnum, and Max) dropped out of operations by 1983. The total number of reported hours of Clevenger, Clevenger Interiors, Hampshire Amrine, and Standard Acoustics, dropped sharply during this period. The number of reported hours of A. C. & S., C & C, Kraft-Murphy, and Walston showed no pattern of growth or remained relatively stable. Maryland Drywall emerged as the largest contractor, but the number of reported hours declined from 1982 to 1983. Only Anning-Johnson and A & P showed a consistent pattern of growth during this period. The total number of reported hours worked remained substantially constant, as did the number of active union employees, notwithstanding the construction boom. Richard Jackson testified that in 1975 about 85 to 90 percent of interior construction and decorating was done by union contractors, but 10 years later the figure was about 10 to 15 percent (within a total commercial general construction market which tripled in size during that decade). In a memo dated February 27, 1984, to then Manganaro Maryland President Hampshire, Jackson, reporting on the progress of negotiations, informed Hampshire that: ''It is important to understand that both labor and management realize that the union market has shrunken.'' In absolute terms the volume of union work remained about the same, but the percentage of work done by union employees dropped sharply. As testified by union general vice president for the 2d District (including District Council No. 51) Michael Monroe, ''[W]e were not only not growing, but . . . just barely maintaining,'' and union labor was not getting work in places where it had historically worked, e.g., on military bases.

The principal cause of this situation was as indicated, the development of double-breasted operations both among general contractors and painting and drywall contractors, and the breakdown of the former distinction between union and nonunion markets caused by double-breasting and the use of construction managers. Technological change was not a significant factor. The impact of such changes took place principally before 1975. I also do not agree with the General Counsel's suggestion that the failure to obtain more work was related in whole or part to a jurisdictional dispute with the Plasterers Union. That dispute, which involved only one drywall contractor, was a consequence of the Union's efforts to stop double-breasting. The Union filed a grievance against C. J. Coakley because of alleged double-breasting. Coakly responded by signing a contract with the Plasterers Union

[7] *Walter N. Yoder*, supra.

which covered drywall finishing work. Plasterers prevailed in a Board 10(K) proceeding. Significantly, in the Seifert memo discussed above, reporting on the 1984 negotiations, he stated that ''if pushed'' by the Union's demand for the ''work preservation'' clause: ''we can go to Plasterers for spacklers. One competitor does use Plasterers.''

The evidence further demonstrates that the Union demanded and struck for the clause at issue for the objective of preserving work historically performed by painting and drywall employees of signatory employers; and the demand and strike were not ''tactically calculated'' at organizing the employees of Sweeney or any other nonunion wing of a double-breasted operation. From the beginning, the Union demonstrated its primary goal. Prior to 1981 the Union granted concessions in order to make signatory employers more competitive in bidding for jobs from construction managers, nonunion general contractors, or otherwise in competition with nonunion firms. Specifically, the Union permitted spraying without contractual restrictions, additional apprentices as needed, and an expanded definition of tenant work, all in connection with such jobs. In 1981 the Union proposed and granted additional concessions for such jobs, for the stated purpose ''to obtain more work in our area'' and ''obtaining work not presently being done by our signatory employers.'' The Union's efforts to enforce the ''reason to believe'' clause of its 1981–1984 contract, further demonstrated a primary work-preservation object. As indicated, the Union offered double-breasting firms four alternative resolutions, of which only one involved recognition as representative of the nonunion wing. None of the Union's grievances were resolved on that basis. The Union resolved its dispute with Maryland Drywall by a divestiture agreement, although Maryland Drywall suggested that the nonunion affiliate (P & P) could go union. The Union also invoked the clause against Minte Company, a painting contractor and historically the largest signatory employer. Minte affiliated with a nonunion wing, Gemini. The Union investigated the situation when it learned that the number of union members employed by Minte dropped from 100–150 to 42. The Union struck Minte, which agreed to divest. Thereafter, the number of unit (Minte) employees increased to the former 100–150 range. (Minte filed unfair labor practice charges, and the Board's Regional Office subsequently advised the Union that the reason to believe clause was unlawful because of its self-help provision.) In the one instance in which the Union sought recognition of nonunion employees, it did so through unfair labor practice proceedings against Apex Decorating Company and its affiliates. In that proceeding the Board found an alter ego relationship in which Apex's principals surreptitiously siphoned off work to nonunion affiliates, leaving the signatory an empty shell. The employers also recognized and acknowledged that union employees were threatened with loss of work in the single market, because of the inability of signatory employers to compete with nonunion firms which maintained inferior wages and working conditions (see my initial decision, discussion of the Hudson-Shatz letter and negotiations in November 1983). During the 1981 negotiations Minte admitted that it was evading the contract by using Gemini. After the present charges were filed, the Union repeatedly informed the employers that the clause at issue applied only when the second employer threatened work covered by the contract and was a device or subterfuge which lessened the amount of work for employees covered by the contract, and that the Union would want the signatory employer to divest its nonunion element. During the 1984 negotiations the Union explained that the employers also had the option under the clause of going totally nonunion. Union Officials Monroe and Ager did testify in sum that they were concerned about declining union membership and the Union's ability to organize new employees. However, it is evident from their testimony, and the Union's overall course of conduct, that they were concerned that lack of work opportunity would discourage potential members from entering the Union's apprenticeship program; i.e., from voluntarily making their careers with signatory employers. This is a legitimate primary concern. See *Electrical Workers IBEW Local 46 (Puget Sound NECA)*, 303 NLRB 48 (1991). The Union did not seek to enhance its membership through recognition from nonunion firms.

The General Counsel contends that the Union cannot maintain a viable work-preservation defense because: (1) that defense is available only in situations involving technological change (Supp. Br. 23); (2) the work-preservation defense applies only to actual proven loss of work, and not to failure to obtain new work; and (3) the union drywall contractors lacked control over the work sought by the Union, because the work is controlled by ''owners, general contractors and construction managers who contract with the drywall subcontractors with whom Respondent bargains and with nonunion subcontractors.'' (Br. 45.) The first argument suffers from the same myopic view as the General Counsel's interpretation of the construction industry proviso. (See my initial decision.) Section 8(b)(4), Section 8(e), and Section 13 (right to strike) were not drafted in order to cover only certain problems or the problems of a particular place or time. Rather, they establish a general framework governing labor management relations, including problems not anticipated at the time of enactment. ''Congress, in enacting Section 8(e), did not intend to protect only certain kinds of work preservation agreements; rather, it 'had no thought of prohibiting agreements directed to work preservation.''' *NLRB v. Longshoremen ILA*, 447 U.S. 490, 506 (1980) (*ILA I*).

The second and third arguments fail both as a matter of law and on the facts of this case. If the General Counsel's legal position is correct, then *ILA I* and *ILA II* (*NLRB v. ILA*, 473 U.S. 61 (1985)), were wrongly decided. The General Counsel's arguments suffer from the same defects as those criticized by the Supreme Court, namely an erroneous conclusion ''that the agreement was directed at work acquisition, rather than work preservation'' (*ILA I* at 512); and a propensity to focus on the work performed by the other employers (here, the nonunion painting and drywall contractors rather than the work historically performed by the unit employees for signatory employers. *ILA I* at 506–8, *ILA II* at 76–77, 82. In the *ILA* cases, ILA sought to acquire for unit employees, the work of stuffing and stripping containers at off-shore facilities, which work was being performed by common carriers whose employees were not represented by ILA. Historically ILA labor did not perform such work. Rather, they loaded and unloaded cargo to and from ships at the docks, for shipping and stevedoring companies. Nevertheless, the Supreme Court held that ''this is not a case in which an avowed work-preservation agreement 'seeks to claim work so different from that traditionally performed by bargaining

unit employees that a secondary objective might be inferred.''' *ILA II* at 81. In the present case, employees of the signatory employers performed the same kind of work as that of the nonunion employees, namely, commercial painting and drywall finishing work in the Washington metropolitan area. This is not a case such as *NLRB v. Enterprise Assn.*, 429 U.S. 507, 531 (1977), approving the Board's right of control test, in which the Association engaged in an unlawful ''product boycott.'' See also *Becker Electric Co. v. Electrical Workers IBEW Local 212*, supra, 927 F.2d at 898; *Berman Enterprises v. ILA Local 333*, supra, 644 F.2d at 938. Moreover, the evidence discussed above demonstrates that the practice of double-breasting, coupled with the breakdown of formerly separate union and nonunion markets, did in fact result in loss of work which otherwise would be performed by signatory employers, and that signatory employers had the power or right, which they exercised, to bid for jobs through the union or nonunion wing as they saw fit, even to the point of switching bidders on a particular job.

This leaves one remaining question to be addressed; namely, whether the Union's work-preservation objective as considered in the context of the multiemployer unit, constitutes a defense to its demand and strike against Manganaro Maryland for the clause at issue. I find that it does. Whether Manganaro Maryland and A. C. & S. constituted separate single-employer bargaining units, the fact remains that in the 1983–1984 negotiations they participated in multiemployer bargaining with the Union. Moreover, Manganaro Maryland and A. C. & S., by virtue of their respective contracts with Painters' Unions in Boston and Baltimore, were obligated to abide by the Washington Metropolitan Area Master Agreement negotiated between the Union and signatory employers. As indicated (initial Decision), the General Counsel did not contend that this requirement was unlawful. In this context, it would border on the absurd to conclude that the Union could lawfully demand and strike for the work-preservation clause from other signatory employers, but was required to exempt Manganaro Maryland from the clause. One can well imagine the reaction of the other union contractors if the Union took such a position.

On the foregoing findings of fact and conclusions of law, the findings of fact and conclusions of law contained in my initial decision, and the entire record, and for the reasons stated in my initial decision and this supplemental decision, I reissue the following recommended[8]

ORDER

The complaint is dismissed in its entirety.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.